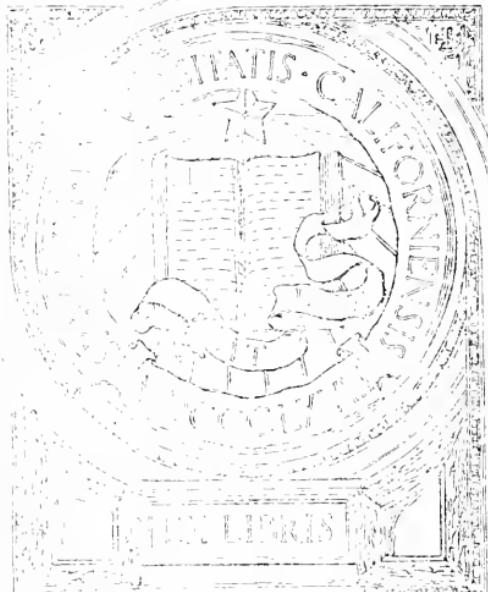




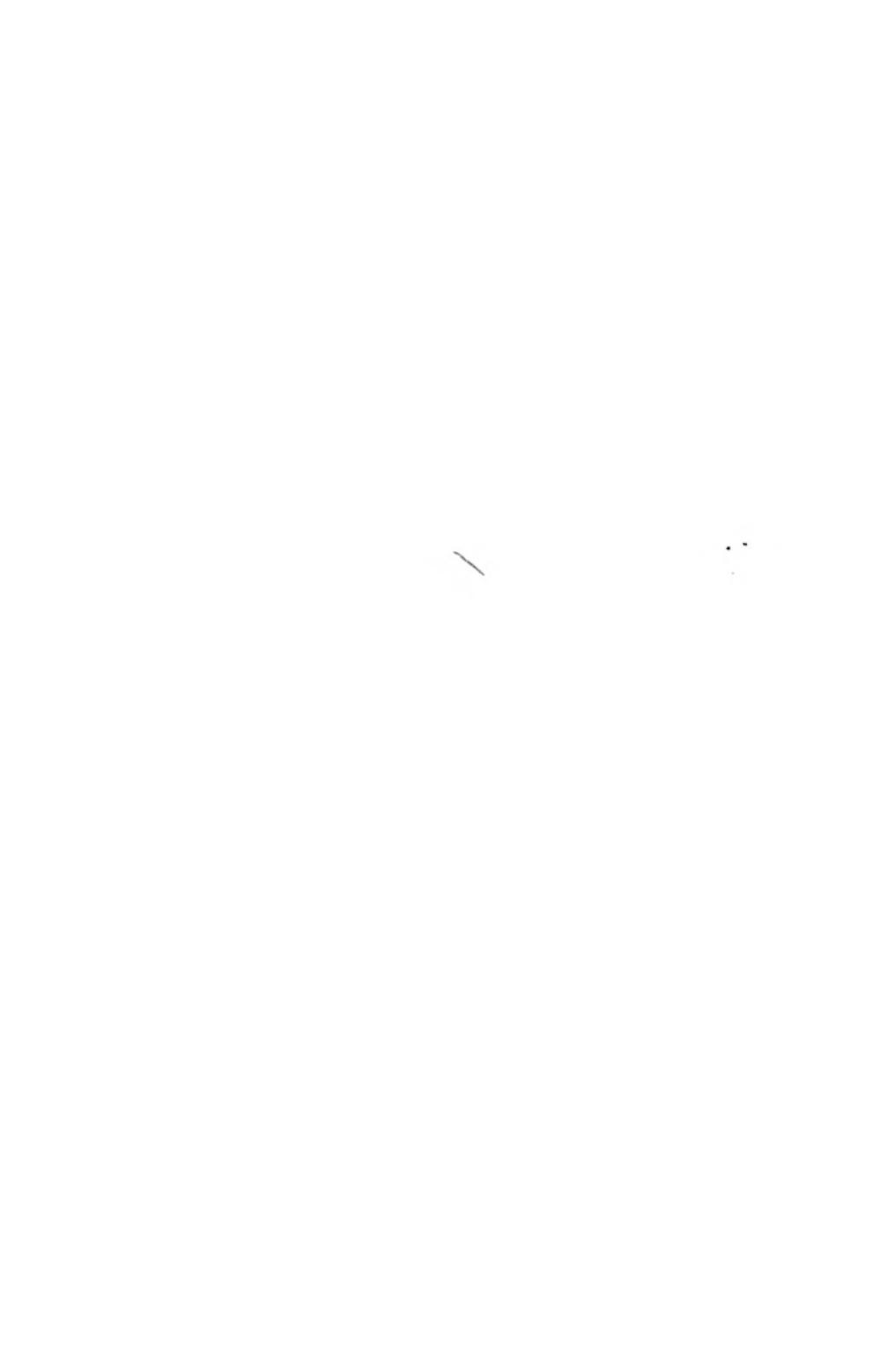
UNIVERSITY OF CALIFORNIA  
AT LOS ANGELES











# SOCIAL JUSTICE

## A CRITICAL ESSAY

BY

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New York

THE MACMILLAN COMPANY

LONDON: MACMILLAN & CO., LTD.

1900

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To My Children



## PREFACE

THE present work lies within a sphere of inquiry to which ethics may perhaps lay the best claim, but to which economics and politics have nevertheless a valid right. While the facts dealt with by the several social sciences are largely the same, they are examined from different points of view. The special task which falls to the ethicist is the determination of the absolute value of social institutions, and the statement in as definite a form as possible of the principles which should govern men in their efforts to adjust their lives to the highest ideals of right and justice. In a certain sense, each social science has thus its own ethic. Each of these separate ethics must, however, rest upon general principles of right, which have first to be determined in the abstract. It is the aim of this volume to ascertain, if possible, these general principles.

The value of this inquiry is dwelt upon more fully in the opening chapter, but it will not be amiss to point out here that it is only as armed with the results which an investigation of this sort affords, that one becomes qualified to pass judgment upon the justness of the demands so powerfully put forth

in our day by those large bodies of thinking men and women who, grouped under banners anarchistic, socialistic, or communistic, are demanding a radical readjustment of social and industrial conditions.

No pretence is made that a new system of ethics has been developed. In the main the standpoint taken is that of T. H. Green and the later writers of his school. The only merit claimed, therefore, in this respect, for the present work, is that in it there has been made a more comprehensive application than has perhaps been before attempted of transcendental principles to the concrete problems of social life.

It is hoped, however, that this work will possess value not only as a study in ethical speculation, but as a contribution to the history of social and political philosophy. In the case of each point considered the treatment has taken the form of an examination and criticism of the chief theories which have been formulated in the past. In stating these theories, it has been deemed the only satisfactory way to reproduce the exact language of their authors, even though this has necessitated frequent and, at times, extended quotation.

For inspiration as well as direct assistance, the author has drawn from so many sources that it is difficult to give due acknowledgment except so far as it can be done in footnote references. In many cases, however, the assistance derived, though none

the less real, has been of such a general character as to render specific citation impossible. I wish, however, to express the especial help I have obtained from my colleague, Professor Sidney Sherwood. I have had the opportunity of discussing with him a number of the points considered, and besides reading a part of the book in manuscript, he has read the whole of it in proof.

A portion of Chapter VIII, under the title "The Right of the State to Be," has appeared as an article in the *International Journal of Ethics*; and all of Chapter IX has been published in the *American Journal of Sociology*. I am indebted to the editors of these magazines for their courtesy in permitting me to use this material again in this work.

Finally, it should be said that these chapters were originally delivered in lecture form at the Johns Hopkins University. This will account for, and it is hoped excuse, a certain amount of reiteration and didacticism which will doubtless appear as the book is read.

W. W. W.



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# **SOCIAL JUSTICE**



# SOCIAL JUSTICE

## PART I

### CHAPTER I

#### INTRODUCTORY: NATURE AND VALUE OF THE PROPOSED INQUIRY

IDEALS of right constitute the essentially active principles in our social and political life. Dating from the Revival of Learning, or, still more directly, from the Protestant Reformation, the sovereignty of the individual reason has been increasingly recognized. At first, the criticism which sprang from independent thought was directed almost wholly against the Church, which had claimed for itself the power to promulgate theological dogmas and moral rules, the correctness of which the individual was not allowed to question. As the doctrine of the right of individual judgment spread, however, political powers were brought within range of criticism. The authority of the State, as well as of the Church, the binding force of law and custom, as well as of theological rule, was inquired into. Not only were civil laws examined with respect to their validity, but the tenure and extent of the authority of the lawgivers brought before the bar of reason. Thus, in the sixteenth, seventeenth, and eighteenth cen-

turies, the doctrine became general that political rulers, if they would have the obedience of their subjects, should hold themselves bound to observe certain moral principles, and to administer their high offices as public trusts. Incorrectly interpreted, this thought led to the French Revolution. Correctly interpreted, it gave rise to representative and constitutional government.

Within the present century the circle of current conceptions of right has broadened, until the whole sphere of industrial and social life has been included. In the nature of things this extension was bound to come, and could only be kept back temporarily by popular apathy and ignorance. As had been the case in the field of politics, the demand for social reform has taken, in many instances, the form of utopias based upon the crudest reasoning. Within more recent years, however, industrial demands have assumed more coherent form, and have been supported by closer reasoning.

With that condemnation of conditions of life which proceeds from the adherents of certain metaphysical schools we need not be much concerned. The philosophical pessimist sees, to be sure, in his survey of the conditions of humanity, an excess of evil over good, and of pain over pleasure, but such criticism is not directed at special conditions. The same doleful result rewards his retrospect of the past, and a similar shade clouds his horoscope for the future. This lamentable condition of affairs he conceives to be due, not to any special features of our

social life that may be altered, but to man's inherent nature, and his necessary relations to cosmic conditions generally. Fortunately, however, such metaphysical moultings do not constitute a characteristic of present philosophical thought, and, because of their abstract and esoteric character, are not generally influential in the world of practical thought and action. We shall, therefore, in the present work, confine our attention to those condemnations of our social régime that are based upon criticisms of fact, and which, therefore, lead to demands for general reform.

These criticisms we find assuming a variety of forms. On the one hand, it is charged that even that degree of restraint which existing social conditions impose is harmful, and should be lessened. This is the position of pure individualists and anarchists. On the other hand, it is claimed by a much larger school that restraints still greater than those which now exist should be placed upon human competition. This is the opinion of collectivists, nationalists, and socialists, and, in fact, of all those who advocate an extension of social control. The common predicate, however, of both schools, is that the distribution of pleasures and privations which is brought about by present conditions is essentially uneconomical as well as unjust: uneconomical, because leading to waste and misdirected effort; unjust, because apportioning rewards and penalties with but little reference to those canons of desert which a true ideal of distributive justice would prescribe.

It needs no argument to show that the maintenance of the ethical claim is essential to the cause advocated. If this feature be substantiated, there is at once established an almost convincing reason for acceptance of the system based upon it. Until, however, it has been clearly shown that the principle of distributive justice which lies at the basis of a proposed scheme is sound, the argument in behalf of its productive efficiency is not entitled to a hearing. In truth, but few will dispute that a reform which will lead to greater distributive justice is justified, even should productive efficiency be somewhat lessened. Conversely, any scheme of social or industrial organization which is ethically defective upon its distributive side must stand condemned, whatever its excellence upon its productive side.

To the recent English translation of a work of Menger which is devoted to a history and criticism of the socialistic claim of the right of the individual to the whole produce of his labor, Professor Foxwell has prepared an introduction, in the course of which is clearly stated the importance of inquiries of the character of those with which we are to be concerned.<sup>1</sup> The argument is there directed especially to a demonstration of the utility of an examination into the validity of a single principle of economic justice, but so exactly do the words represent, and so brilliantly do they express, the motives which have

<sup>1</sup> *Das Recht auf vollen Arbeitsertrag in geschichtlicher Darstellung*, translated by M. E. Tanner under the title "The Right to the Whole Produce of Labor."

led us to undertake the present work, that we cannot refrain from quoting them at considerable length.

After referring to the fact that English economists have failed to give sufficient attention to the legal conditions which underlie economic facts, Professor Foxwell goes on to declare that even the correction of this error will not be enough. "We must go beyond the study of positive law," he says, "to the study of the conception of ideal right on which it is based. It has been said that the science of one age is the common sense of the next. It might with equal truth be said that the equity of one age becomes the law of the next. If positive law is the basis of order, ideal right is the active factor in progress. To use the Comtian phrase, there is a dynamical as well as a statical jurisprudence, and both are vitally important to the economist. The whole aim and object of economic policy and legislation, the trend of all movements for social reform, revolutionary or progressive, must depend upon the prevailing sense of ideal right, upon the notions of justness and fairness, more or less coherent, which recommend themselves to the governing body of opinion at any time as axiomatic and unquestionable. Vague and intangible, perverse or impracticable, as they may seem, these notions of right are none the less real and resistless in their sway. They are themselves, no doubt, not unaffected by positive law, as Maine and others have shown. But in progressive societies they are a living, and in the long run a dominant, force. Their growth is slow and secular; revolutions and

counter-revolutions may run their course, while they remain but slightly changed: but, as they generally develop, they fuse and transform the whole structure of positive law, and alter the face of civil society. . . . That there are such underlying ideas of right, and that the whole tenor of legislation is silently, unconsciously, moulded by the accepted views as to what is economically and constitutionally fair and just, will not be disputed. Crystallized into catching phrases, we meet with those current ideals of equity at every turn. . . . One man, one vote; a living image; a fair day's wage for a fair day's work; equality of opportunity; *à chacun selon ses œuvres*; property is a trust; a man may do as he likes with his own; *caveat emptor*; *laissez faire*,—these and many others will be familiar to us as effective instruments of economic and political movement. If they are modified, the legislation of all free countries will reflect the change; until they are modified, no forcible revolution will have more than a superficial and transient effect.” And a little farther on Professor Foxwell makes the emphatic, but fundamentally true, statement, that, “It is hardly too much to say that in the gradual development of these ideals of right, and the relation between their development and the development of positive institutions, we have the key to social stability. That form of society is most surely rooted in which these movements are fairly concurrent, in whose legal structure and economic relations the prevailing notions of equity or axioms of justice are most faithfully mirrored; and where they are

carried out in similar degree in all the various sides of social life."

Important as is, at any time, the study of these underlying ethical principles, especially urgent is the need for their examination in these present days of social and political unrest. Together with the extension of the political franchise there has been secured within recent years an equal or greater diffusion among the people of intellectual enlightenment and freedom. Ultimate political power has thus been diffused at the same time that tradition and dogmatic religion have lost their former controlling force. Individual reason has been recognized as the true judge of right and wrong, with the result that the peoples of all civilized countries are subjecting social and economic conditions to the same tests of reasonableness and justice as those by which they have questioned in the past the rightfulness of political institutions. This criticism has revealed discrepancies in many places between the ethical ideals currently held, and the social and economic conditions actually existing. "In these respects," says Professor Foxwell, "our own time does not compare favorably with the Middle Age. Not only is our age one of exceptionally rapid change, but our ideals are changing even more rapidly than our institutions, so that we live in an atmosphere of social ferment and revolutionary proposals. What makes the situation still more critical, and forms to my mind the peculiar danger of modern societies, is the startling contrast between their political and

economic development. In politics, equality; in economics, subordination. One man, one vote; why not also one man, one wage? This contrast, which must be brought home to the dullest at election time, is full of social unsettlement, and is quite sufficient to account for the unrest characteristic of our day. How different was the inner harmony of the system of the Middle Age, where the economic order found its parallel in the political order, and was even reflected in the spiritual order, and projected in the conception of another world. The mediæval conditions resulted in a long period of organic and stable society; the modern mark an age of transition, perhaps of revolution."

This mediæval harmony has so strongly appealed to some minds that a return to it has been declared by them desirable and even practical. In the systems of such thinkers as de Maistre, of Comte, and of Carlyle, ecclesiastical and feudal hierarchies play a prominent part. That such a return would be undesirable we need not argue; but whether desirable or not, time may be taken to point out that the strivings of the present age nowhere point to a desire for the reëstablishment of past conditions. The whole modern spirit, whether voiced by the discontented or the contented, is fundamentally opposed to the mediæval idea,—opposed spiritually, intellectually, politically, and economically. Spiritually, the mediæval idea was one of separation of Church and State, of contrast between matters ecclesiastical and secular, of antagonism between flesh and spirit. The Christian religion as

taught was generally non-social in spirit, and often openly anti-social. To all this the modern spirit is antithetical. According to it the good life is to be led, not by an ascetic withdrawal from social conditions and obligations, nor by walking with the eyes ever directed to the world to come, but by entering to the fullest possible degree into this life, here and now, and by utilizing the social and political forces by which one is surrounded for the concrete realization of the highest ideal which the individual reason is able to suggest. Intellectually and politically the mediæval and the modern minds are poles apart. In the one, the dominant principle was authority; in the other, it is freedom. At first thought, individual freedom seems to involve moral and political anarchy. This is what de Maistre and Comte thought, and they believed that the French Revolution had demonstrated it. It is for this reason that they would have restored that division between spiritual and temporal authorities which existed in the Middle Ages. But the idea of freedom which the Protestant movement introduced has within it, when properly interpreted, the principle of order as well as the element of destruction.<sup>1</sup> Economically, aside from the greater diversity and complexity of present conditions, the great distinction between modern and mediæval industrial life consists, of course, in the difference between production on the large and on the small scale; between the factory system and the

<sup>1</sup> For a fuller treatment of this subject, see Chapter VII, "The Right of Coercion."

domestic workshop. The impossibility of a reversion to the older régime in these respects is manifest.

No, the demand of the discontented of the present age is not for a return of the conditions of any former time. The feeling rather is that, taking conditions as they are, the distribution of rewards, economic or other, which actually obtains should be modified so as to accord more nearly with current conceptions of fairness and right. As long as this feeling prevails, the stability of our social and economic order cannot be guaranteed. Reforms that ameliorate the conditions of the more unfortunate classes may prevent acute trouble, but, until the people generally are able to see at least a substantial realization of the principles which they believe to be just, there cannot be obtained that harmony between popular thought and objective institutions upon which a permanent social order must rest. It is to be emphasized, moreover, that this harmony can only be obtained by satisfying current conceptions of right, in so far as they are essentially valid. It well behooves the social reformer, therefore, to consider carefully which of the popularly alleged canons of distributive justice have in them the elements of truth and rationality. In so far as they are found valid, the way will be pointed out for reforms that will be permanently effective. In so far as they are found invalid, not only will warning be given to those who might be tempted to ill-advised innovations, but the directions indicated along which the economic and ethical education of the people must proceed.

The general character of the inquiry which we are to undertake has been suggested in the preceding paragraphs. Its form and scope may be more particularly indicated as follows :—

The second chapter will be devoted to an analysis of the idea of Justice as an abstract conception. This principle determined, we shall, in the subsequent chapters, apply it to the concrete problems of our social life. There is, or should be, an ethical justification for every social fact, but to attempt specific justifications will be obviously impossible. It will be possible, however, to examine those features of our industrial and political life which are distinguished, either by their paramount importance, or by the ethical controversies that have been waged around them. In so doing we shall, moreover, be rendering more explicit the principles in accordance with which all other and less important social facts are to be judged.

In mapping out this work, it becomes evident that the problem of social justice may be grouped under two general heads: the proper distribution of economic goods; and the harmonizing of the principles of liberty and law, of freedom and coercion.

Examining first the subject of distributive justice, we shall consider the extent to which the principle of Equality should play a part. Next we shall undertake the definition of the concept "Property," which will involve a critical examination of the various theories that have been brought forward to justify its existence. This done, we shall be ready

to consider the general canons of desert that should govern distribution of rewards. The chief theory considered under this head will be that which bases the right to private ownership wholly upon labor performed. As a subdivision to this inquiry, but, because of its importance, demanding treatment in a special chapter, will be the right to private property in land. The other and less important canons of distributive justice will be treated in still another chapter.

The second of the chief problems of which we have spoken above, the harmonizing of freedom and coercion, will be treated under the three heads, "The Right of Coercion," "The Ethics of the Competitive Process," and "Punitive Justice."

## CHAPTER II

### JUSTICE

THERE is one problem which, by its importance, dwarfs all other subjects of human inquiry; one principle which, if discovered and reduced to definite statement, will furnish the key to unlock the doors which have hitherto barred the way to the solution of the greatest questions that have agitated the minds of men in their efforts to adjust their social conduct to the highest standards of right. This problem is the determination of the true canon or canons of distributive justice.

As soon as the sense of moral obligation is felt, the idea of desert necessarily makes its appearance, and with the emergence of this idea comes the need for standards in accordance with which individual merit may be measured. In the earliest stages of religious development this need was not strongly felt. Still, the need was there, and to some extent consciously recognized. As regards the relations of men and the gods the authority expressed by the latter, though often viewed as arbitrary in the extreme, was yet held to be determined in the main by the merit of those ruled. As regards the relations between man and man, the arbitrary element, at least from the modern standpoint, seems to have

entered. Existing institutions and conditions, political as well as economic, if not given in these earlier times an explicit sacrosanct character, were at least seldom subjected to critical examination as to their social value. Tradition, the commands of the priesthood, or the orders of the ruling political classes were accepted as necessarily obligatory; and, though there may have been occasional bewailings of lot, little attempt was made to ascribe economic or political hardships to the operation of wrong principles of distributive justice.

As intellectual development advanced, however, men began to reflect more seriously regarding themselves, and the nature of the world in which they lived and the forces by which they were surrounded. At first this inquiry went little farther than an attempt to explain the purely phenomenal world, and resulted only in the formulation of crude and fantastic cosmologies. Thus philosophy, in its metaphysical sense, took its rise. Next, however, extending their inquiry to themselves as living, thinking beings, men attempted to seek out, in a speculative way, the meaning of life, and to analyze their relations toward one another and the cosmos. Examining actual social and political conditions, a *quo warranto* was demanded of them. Thus ethical philosophy began. This stage of thought was reached in Greece in the Sophistic period. By the Sophists, the so-called teachers of wisdom, all currently accepted rules of morality were fearlessly examined, and declared founded upon no general principles of right. In-

dividual interest and individual caprice, it was asserted, furnished the sole foundations for existing moral and legal conventions. Guided by such teachings, the social and political bonds of Greece seemed upon the point of dissolving. In this desperate condition of affairs Socrates came forward with his keen dialectics to teach the doctrine that beneath all laws and customs, despite their variety and apparent contrariety, general rules of morality are to be found of so abstract and refined a character as to be capable of universal application, and of such essential rationality as to be intrinsically obligatory upon men as intelligent beings. His doctrine, in other words, was that, though there would appear to be inconsistencies in the rules governing the same subjects at different times or at different places, beneath these inconsistencies there may be discovered common moral elements, which give to the rules their ethical validity in so far as they have validity at all. Thus was made the first deliberate attempt to seek out the pure principles of practical morality. It is true that Socrates' own work went little beyond showing the inconsistencies of current Sophistic assertions, yet the doctrine which we have mentioned was there, and the positive side of the work which Socrates had begun was immediately taken up by his great pupil Plato, and continued in turn by the still greater Aristotle. From Aristotle's time to the present day speculative spirits, one after another, have continued this search for the canons of right and justice.

The existence of eternal, immutable canons of con-

duct being granted, philosophers and ethicists have confidently attacked the problem of definitely determining, by pure reasoning, the prescriptions which they give. To these prescriptions has generally been given the name "natural laws." By their essential rationality these laws have been held to be binding at all times, in all places, and upon all men. As such they have of course been considered as controlling political rulers, and, conversely, as securing to the individual rights for the violation of which no justification may be offered.

During the long centuries of the Dark Ages little was added to the contributions which the Greeks had made to the world's stock of philosophic knowledge. Indeed, much that had been discovered disappeared from the learning of Europe. Fragments only of the writings of Aristotle and Plato were known, and these for the most part in corrupt translations. All philosophy became dominated by the theological spirit, and thus the Natural Law, which to the Greeks had been interpreted as the commands of Great Nature—*Natura Naturans*—became, at the hands of the churchmen, the Laws of God. During the scholastic period, however, though nothing was added in substance, much was gained in definiteness. The various conceptions involved in the moral philosophies of the heathen and Church writers were subjected to that keen analysis which the schoolman's sharpened dialectical skill rendered possible. This analysis culminated in the system of Thomas Aquinas, in which the *lex aeterna*, *lex humana*, *lex*

*divina*, and *lex naturalis* were sharply and logically distinguished.

From the time of Aquinas to that of Kant is a long step, five hundred years, in fact, yet during all that time there was no change in the currently received doctrines of natural right which, for our present purposes, need be considered. During the seventeenth and eighteenth centuries, however, the idea of which we have spoken above, that it lies within the power of men definitely to determine and state each of the special duties which the ethical law commands, became more pronounced. It was declared with increasing emphasis that, starting with a few axiomatic principles, it is possible to determine, *more geometrico*, all of the special obligations under which men, as moral beings, rest. This, for instance, was the view maintained by Locke, Spinoza, and Wolff. Thus Locke, starting with "the idea of a Supreme Being infinite in power, goodness, and wisdom, whose workmanship we are, and on whom we depend; and the idea of ourselves as understanding, rational beings," declares that "from [these] self-evident propositions by necessary consequences as incontestable as those in mathematics, the measures of right and wrong might be made out to any one that will apply himself with the same indifference and attention to the one as he does to the other of these sciences."<sup>1</sup> Spinoza went so far as to cast his ethics in the geometrical form of propositions, demonstrations, and corollaries.

<sup>1</sup> Cf. Schurman, *Ethical Import of Darwinism*, Chapter I.

It was as much these absurd pretensions as it was the sceptical results of Hume's reasoning, that awoke the philosopher of Königsberg from his "dogmatic slumber." Negatively the result of Kant's work was to show the utter lack in the ethical systems of his time of a metaphysic or epistemology adequate for the support of the premises upon which they were founded. Positively, the result was to transfer to the individual human reason the legislative source of moral law. The significance of Kant's doctrine in this respect has been brilliantly stated by Salmond.<sup>1</sup> "In the system of Kant," says Mr. Salmond, "the law of nature, or, as he prefers to call it, the moral law, appears as the categorical imperative of the practical reason. It is not difficult to recognize under this new disguise the conception already familiar to us. Law, for Kant, as for every one else, is a command; but he expresses this in his own way by saying that it is a 'proposition which contains a categorical imperative.' That the law of nature is a command or dictate of reason was already familiar doctrine in the time of Cicero; Aquinas and the schoolmen taught it, and from their day to that of Kant himself, it has not been rejected or forgotten. . . . The element of originality in Kant's system is his unreserved acceptance of what is called the metaphysical doctrine of natural law. When Aquinas says that this law is the dictate of practical reason, he means primarily the reason of

<sup>1</sup> In an article entitled "The Law of Nature," contributed to the *Law Quarterly Review* for April, 1895.

God, not of man — *ratio videlicet gubernativa totius universi in mente divina existens*. Human reason is not *per se* possessed of legislative authority, but is merely the secondary source of the law of nature, as being the means by which law is revealed to man. Kant, however, proclaims a new doctrine of the autonomy of the reason or rational will of man. The human practical reason is a lawgiving faculty, and its commands constitute the moral law. ‘This law,’ he says, ‘. . . is a single isolated fact of the practical reason announcing itself as originally legislative.’ *Sic volo sic jubeo*. Reason is spontaneously practical and gives that universal law which is called the moral law. From this moral or natural law proceeds moral or natural obligation, as most of his predecessors taught. ‘Obligation is the necessity of free action when viewed in a relation to a categorical imperative of reason.’”

It must not be gathered, however, from the above that Kant taught a doctrine according to which it lies within the power of each individual to create arbitrary distinctions between right and wrong. His theory is that what our reason tells us is right becomes, *ipso facto*, categorically imperative upon us. But in reaching its judgments our reason is, by its very nature, governed by the principle that only that can be right which accords with a principle which we can wish to be a universal one. “Act on a maxim,” he declares, “which thou canst will to be a universal law.”

The effect of Kant’s writings was to inaugurate an

epoch in ethical speculation. As modified and elaborated by the later transcendentalists, the result has been to give to the conception of natural rights a changed and more nearly perfect signification. All ethical obligation being posited upon that feeling of oughtness which is given to the individual as an original datum of consciousness when the rightness of a given line of conduct is recognized, and all rules of moral obligation being thus considered as having their source in the legislative power of the human mind to set to itself principles of conduct, the idea of natural right necessarily becomes synonymous with those claims which the individual, as a rational moral being, may claim from others as rational moral beings. As thus conceived, the only rights which may be claimed as natural, in the sense of being innate or essential, are those which are necessary for the realization of one's highest ethical self. Thus, as Green says, "they [rights] are 'innate' or 'natural' in the same sense in which according to Aristotle the state is natural; not in the sense that they actually exist when a man is born, and that they have actually existed as long as the human race, but that they arise out of, and are necessary for the fulfilment of, a moral capacity without which a man would not be a man."<sup>1</sup>

Justice to the individual, then, must, according to these principles, consist in the rendering to him, so far as possible, all those services, and surrounding him by all those conditions, which he requires for

<sup>1</sup> *Philosophical Works*, Vol. II, p. 353.

his highest self, for the satisfaction of those desires which his truest judgment tells him are good. Conversely, opportunity for the fulfilment of highest aims is all that may be justly claimed as a right.

The realization of one's ethical self is the general categorical imperative addressed to every one. Therefore, the putting forward of a claim implies at the same time the recognition of a duty by the individual making the claim. In the legal world the existence of a right in an individual is said to imply the corresponding duty in others to respect that right. In the moral world, however, not only is there this obligation, but there is incumbent upon the subject of the right the duty of employing it, when obtained, for the attainment of the end for which alone it is granted to exist.<sup>1</sup> Further still, the setting up by an individual of a claim for a given privilege or immunity logically implies the assertion by such individual that he has both the disposition and the ability properly to use it when obtained.

But what does the above mean? It means, in the first place, that the "rights" which different individuals may claim are not necessarily the same. It means, in the second place, that there are no absolute rights, no definite natural rights, such as those that so many political and ethical philosophers have

<sup>1</sup> Also, as Mackenzie points out (*International Journal of Ethics*, Vol. IV, p. 425), "there could not be any . . . legal right if there were not a presupposition that, on the average, the individual will use it well." Thus, for instance, the right of freely expressing one's opinions can be tolerated only when men have reached a certain level of reasonableness in the formation of their views.

attempted to declare. The rights which different individuals may properly claim must vary according to their ethical dispositions and capacities. Thus the man who, by his striving, has built up for himself an upright character, has the right to demand from his fellow-men a respect to which his less honest neighbor can make no proper claim. Thus, also, that man who, by his wisdom and probity, is best qualified to direct a certain social force has ethically the best right to be intrusted with its control. In this sense there is a "divine right" of rulership.

There can be no absolute rights, furthermore, for the reason that whether or not a given right should be granted must depend upon all the concomitant circumstances which determine whether or not the special aim sought to be realized by the employment of the right claimed is the most desirable end which, under the given conditions, should be sought. Finally, even were the foregoing not true, it would be logically impossible to maintain the existence of more than a single absolute right. To say that any right is absolute means that it is one which, under all conceivable circumstances, should be granted to all individuals, *quâ* persons, whatever their capacity for ethical development. To select any one right as absolute, means, then, that every other right must always be subordinated to it. Thus, for example, if the right to life be selected as absolute, no justification for its violation can be offered, whether for the sake of the protection of one's own self from grievous bodily injury, or for the warding off of similar injury to

one's own family. No injury to one's honor, or the honor of one's own family, will justify its violation. According to such a premise, life could never justly be taken or exposed to serious danger in war, however righteous the cause for which waged. In fact, no threatened evil to thousands or millions of other men, short possibly of what would entail death, would justify the taking of a single life. To state such logical consequences as these is a sufficient answer to those who would maintain the possibility of an absolute right, even did not the reasoning which has gone before show its impossibility.

So important is this point of the relativity of all rights that, though it be a repetition, a quotation from Green's *Prolegomena to Ethics* is justified. "We need not shrink," says Green, "from asserting as the basis of morality an unconditional duty, which yet is not a duty to do anything unconditionally except to fulfil that unconditional duty. . . . This is the unconditional ground of those particular duties to do or to forbear doing, which, in the effort of the social man to realize his ideal, have so far come to be recognized as binding, but which are in some way or other conditional, because relative to particular circumstances, however wide the range of circumstances may be, to which they are relative. . . . Every one . . . of the duties which the law of the State or the law of opinion recognizes must in some way be relative to circumstances. . . . Yet there is a true sense in which the whole system of such duties is unconditionally binding. It is so as

an absolute imperative to seek the absolutely desirable, the ideal of humanity, the fulfilment of man's vocation. . . . It enjoins the observance of the whole complex of established duties, as a means to that perfection of which it unconditionally enjoins the pursuit. And it enjoins this observance as unconditionally as it enjoins the pursuit of the end to which this observance is a means, *so long as it is such a means*. It will only allow such a departure from it in the interest of a fuller attainment of the unconditional end, not in the interest of any one's pleasure."<sup>1</sup>

Let us stop now to sum up the results thus far reached regarding the nature of justice. Negatively, we have determined that there are no such things as definite, absolute rights. Positively, we have learned that justice consists in granting, so far as possible, to each individual the opportunity for a realization of his highest ethical self, and that this involves, or rather is founded upon, the general duty of all, in the pursuit of their own ends, to recognize others as individuals who are striving for, and have a right to strive for, the realization of their own ends. In other words, there is the general ethical mandate to be a person, and to respect others as persons; to treat others as ends, never as mere means to one's own end.

These conclusions to which we have been led have been reached deductively. In the chapters which are to follow, we shall examine the chief of those attempts which have been made to declare rules of

<sup>1</sup> §§ 197, 198.

justice of the absolute character that we have declared to be impossible. If, as a result of such examination, we should discover that no one of them can be successfully defended as absolutely valid, *i.e.* as valid under all conceivable circumstances and conditions, then truly we shall feel that there has been afforded substantial support for the position which we have already assumed upon this point. For if, after the expenditure of all the intellectual effort that has been made in the past by the wisest men of their times to ascertain such rules, no laws of justice have been discovered which may be universally and rigidly applied without leading to undesirable and unjust results, certainly a presumptive proof is offered that no such laws can be framed. And this will give us a confidence in assuming that our general reasoning has not been vitiated by any important error.

Is this, however, we are forced to ask, the most definite formulation of which the idea of justice is susceptible? By the side of those ethical systems which have claimed to lay down for our guidance concrete rules of conduct, or at least definite criteria of the goodness or badness of different modes of conduct, it does certainly seem unsatisfactory to be informed that no definite rules of absolute validity can be laid down; that only the general advice can be given to seek the nearest possible realization of the highest possible personal perfection. Our personal and social necessities compel us to ask, Can we not rationally deduce some guiding principles of conduct,

some definite maxims which will enable us to test the justice of social institutions and forces, and which will afford us at least the clews for determining the privileges and immunities which an individual may justly claim from society? If our inquiries are necessarily to end in a general *non possumus*, what, we are tempted to ask, is the value of an attempt to seek practical guidance in the ethical field? It is the positive results we most desire, and to what positive results can such an inquiry lead?

The positive results will be these. In the first place, in demonstrating the impossibility of framing absolute rules of justice, the necessity will be emphasized of bringing each of our acts to the bar of reason, and of determining in each case, not simply its formal accordance or non-accordance with some previously accepted rule of conduct, but whether, as a matter of fact, both the ethical motive which prompts its performance is a proper one, and its ultimate as well as proximate results will be such as will tend to advance the realization of the highest good which our reason has been able to suggest. With no thumb rules to guide us, we will be thus taught that what is right and what is wrong for us as members of a society can be determined only after we have ascertained all the circumstances which have led to a given state of affairs, as well as the conditions by which a given line of conduct is to be influenced in the future. This will mean that at least a certain amount of study of actual social conditions

is imperative upon every one, and especially upon those who would seek to teach or guide others. The study of the social sciences will thus be shown to be, as it were, a propædeutic to the science of right living.

Secondly, the impossibility of formulating absolute rules of practical morality will not prevent us from discovering and stating those general considerations which an intelligent acquaintance with the social conditions of any one time or place suggests as having a bearing upon concrete lines of conduct. Ethics as an art is not bound by the limitations which surround it as a science or philosophy. As a science or philosophy any body of knowledge, in order to be at all valuable, must be absolute, certain. As an art, however, any information is of value. Thus, after a careful examination of all the qualifying circumstances in a given case, we may state for the guidance of others those rules of right which it seems to us will, upon the whole, produce the greatest aggregate of justice. In this way we shall be able to justify the existence of a positive law and to advocate its operation under existing conditions because we think its effects as a whole are for good. At the same time we may fully recognize that at times the operation of the law will be unjust, and clearly see that under other conditions a more nearly perfect rule might be applied.

Finally, it may be pointed out that, though our examination leads to a declaration that there cannot be definitely formulated any absolutely valid rules

of justice, it is of great importance that we should demonstrate this fact, for by so doing we deprive dangerous revolutionary and socialistic schemes of the ethical support that is claimed for them.

## CHAPTER III

### EQUALITY

THE idea of desert implies that of impartiality. Impartiality, it should be noted, is distinct from that of equality. It requires merely that where favor is shown, some sound reason should exist for doing so. As Mill says, "Impartiality as an obligation of justice may be said to mean being exclusively influenced by considerations which it is supposed ought to influence the particular case in hand, and resisting the solicitation of any motives which prompt to conduct different from what these considerations would dictate."<sup>1</sup> The exclusion of preferences based on irrelevant considerations does, indeed, often lead to an equality of treatment, but this is an accidental result, not a necessary consequence. Therefore, to repeat, in admitting the idea of impartiality as an essential element in the idea of justice we are not committed to any doctrine of equality.

At first thought it might seem that a rigid application of this doctrine of impartiality would require us to stigmatize as unjust all preferences based upon mere affection, that is, upon feelings of friendliness or love which are not wholly predicated upon a conscious estimate of worth in the one for whom the friendli-

<sup>1</sup> *Utilitarianism*, Chapter V.

ness or love is felt. It would thus seem that the mother's greater love for her own than for another's offspring would, in the greater number of cases, stand condemned.

This point has been seized upon and argued with great force by Godwin in his *Political Justice*. "In a loose and general way," he says, "I and my neighbor are both of us men; and of consequence entitled to equal attention. But in reality it is probable that one of us is a being of more worth and importance than the other. A man is of more worth than a beast because, being possessed of higher faculties, he is capable of a more refined and genuine happiness. In the same manner the illustrious Archbishop of Cambrai was of more worth than his chambermaid, and there are few of us that would hesitate to pronounce, if his palace were in flames, and the life of only one of them could be preserved, which of the two ought to be preferred. . . . We are not connected with one or two percipient beings, but with a society, a nation, and in some sense with the whole family of mankind. Of a consequence that life ought to be preferred which will be most conducive to the general good. . . . Supposing I had been myself the chambermaid, I ought to have chosen to die, rather than that Fénelon should have died. . . . Supposing the chambermaid had been my wife, my mother, or my benefactor. This would not alter the truth of the proposition. The life of Fénelon would still be more valuable than that of the chambermaid; and justice, pure, unadulterated justice, would still have preferred that which

was most valuable. . . . What magic is there in the pronoun 'my' to overturn the decisions of everlasting truth? . . . Every view of the subject brings us back to the consideration of my neighbor's moral worth and his importance to the general weal as the only standard to determine the treatment to which he is entitled. Gratitude, therefore, a principle which has so often been the theme of the moralist and poet, is no part either of justice or virtue. By gratitude I understand a sentiment which would lead me to prefer one man to another, from other considerations than that of his superior usefulness or worth: that is, which would make something true to me (for example, this preferableness) which cannot be true to another man, and is not true in itself." <sup>1</sup>

There is considerable force in the argument just given, and indeed, when properly interpreted, much of it may be accepted. The highest good, at least as men are now constituted, is, as we shall show later on, a social one. For its attainment the maintenance of social relations is necessary — so necessary, in fact, that the individual is able to find his best self-realization only when he seeks his own good in the good of others and of society at large. We cannot therefore take objection to the declaration of Godwin that when the social good seems so to demand, the objects of one's affections should be sacrificed. But here is the vital point. When we speak of the social good, we must conceive of that good in its highest

<sup>1</sup> Book II, Chapter II.

terms. This means the absolute abandonment of such criteria as ordinary utilitarianism affords, and the acceptance of idealistic conceptions in their place. It means, furthermore, a holding in view of the ultimate, as well as the proximate, results of an act. When these conditions are observed the acceptance of Godwin's formal law of justice, so far from rendering preference due to affection or friendliness inequitable, upon the contrary affords, in the greater number of cases, the very highest sanction for their exercise. When, for example, we consider that the integrity of the family, which is founded upon parental and filial love, furnishes the surest basis of public order and morality, that within its circle are aroused and stimulated many of the highest and truest virtues,—when we consider this, we see at once that, in the broadest sense of justice, loving preferences based upon kinship are of such transcendent importance in individual as well as social culture, that the distributive inequalities to which they may give rise are of little significance. Even if justice be conceived as simply a principle of utility, the same is true, provided it be admitted, as of course it must be, that a social life is of value to men. For it is within the family and friendly circles that are engendered and cultivated the principles of conduct which render the maintenance of a social life possible.

What has been said as to the preferences arising from blood relationships applies, *mutatis mutandis*, to most of the exhibitions of partiality based upon sentiments of friendliness and of race and political affiliation.

tions. Adam Smith remarked the fact that men were more likely to be moved by the sufferings of their neighbor caused by a corn upon his great toe, than by the starvation of millions in China. Such an extreme discrimination is of course irrational, and therefore an injustice. In the aggregate, however, it is true that partialities of neighborhood, race, and nation are of enormous value in cementing the bonds which unite men and women into coöperating units. Edmund Burke expresses this idea when he says: "To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle, the germ, as it were, of public affections. It is the first link in the series by which we proceed toward a love of our country and mankind."<sup>1</sup> The millennial time may come when the brotherhood of mankind will have received such full recognition that ethnic and political bonds will lose much, if not all, of their present importance. As yet, however, their existence would seem to be needed. With the standard of culture that now generally prevails, abstract love of humanity, while lofty as an idea and not difficult for the ordinary mind to grasp, is yet one that can hardly be relied upon to furnish an effective motive in everyday life. Love of humanity may easily be associated with an indifference to men individually.

Professor Mackenzie, in his *Introduction to Social*

<sup>1</sup> Cf. Leslie Stephen, *Social Rights and Duties*, Vol. I, chapter entitled "Social Equality," from which the above quotation has been taken, and which has been suggestive upon a number of the points considered in this chapter.

*Philosophy*, has some admirable remarks upon the point we have been making. He introduces also the caution, which we should have stated, that the justification of discriminations founded upon love or friendship does not justify everything that may be done in their name. "The unity which is founded upon natural feeling," he says, "must precede that which depends upon acquired sympathies and thoughts. To begin with the love of humanity would be to begin with a cold abstraction. The family is like a burning-glass which concentrates human sympathies on a point. Within that narrow circle selfishness is gradually overcome and other interests developed. Each one is supplied with the opportunity of knowing a few human beings thoroughly, than which nothing is more important as a first stage in the transcendence of the merely individual self. One who knows only himself inwardly and sees others only by a kind of outward observation, which in a large circle is an almost inevitable result, is apt to become for himself too entirely the centre of his world, if, indeed, he ever forms a world or cosmos for himself at all. The family enables a few persons to become, not merely objects for each other, but parts of a single life; and the unity thus effected may then be very readily extended as sympathies grow. At the same time, it cannot be denied that the family has the danger of all exclusive forms of association. The garden wall hides the horizon. The selfishness of a family may be not less repellent than that of an individual; and the former kind of selfishness is much more insidious

of the two, since the evil spirit is there masquerading as an angel of light. The cure for these evils, however, is to be found, not by destroying the family, but by treating it as a preparation for a more complete form of union.”<sup>1</sup>

Admitting now the rightfulness of such preferences as are necessary for the maintenance of the social relationships of which we have been speaking, we turn to ask to what extent, if any, the idea of equality should, in other respects, be recognized in our conceptions of distributive justice. Before we can do this, however, it will be necessary to distinguish the different applications of which the term “equality” is susceptible. There are six general senses in which we may speak of equality; namely, (1) Spiritual, (2) Natural, (3) Civil, (4) Political, (5) Social, (6) Economic.<sup>2</sup> We shall consider each of these in the order given.

**I. Spiritual Equality.** — This form of equality refers to men viewed as moral beings, as partakers in the divine reason. Taken in this sense there can be no hesitation in accepting the abstract equality of all men as a statement of fact. By “abstract equality” we mean that, viewed simply as ethical potentialities, all men are equal before Him who holds them in the hollow of His hand. As actual individuals, however, and as standing before God as their judge, men and women must be considered as entitled to recognition

<sup>1</sup> *Op. cit.*, pp. 363-364.

<sup>2</sup> This is the classification made by Mr. James Bryce in an article entitled “Equality” in the *Century Magazine* for July, 1888.

according to their ethical deserts. Spiritual equality thus has reference simply to human beings viewed as beings with moral possibilities. When the question of moral desert is raised, the only obligation that would seem to be imposed is impartiality.

This idea of the spiritual equality of all men was practically unknown to antiquity. This appeared explicitly where a caste system upon a religious basis prevailed. Sir Henry Maine tells us that he has himself heard a high caste Indian declare that it is the teaching of religion that a Brahmin is entitled to twenty times as much happiness as any one else, and this not upon the ground of individual merit arising from any conduct or mode of life on his part, but because intrinsically, *quâ* Brahmin, he is twenty times the superior of those of a lower caste.<sup>1</sup>

Aristotle and Plato, while not perhaps explicitly repudiating the idea of spiritual equality, laid no emphasis upon it. In fact, inasmuch as they held that individuals had an existence as persons only as members of the State, their intrinsic worth as persons could hardly have been clearly recognized. Thus, while the physical and mental differences between individuals were clearly recognized and repeatedly drawn, little or no mention was made of the essential spiritual likeness which underlies these differences. The natural result of this was that these mental and physical differences were so emphasized as to divide men into classes almost generically distinct. The gap which thus divided Greek and

<sup>1</sup> *Early History of Institutions*, p. 399, American edition.

barbarian was made so broad as wholly to exclude the latter from the essential rights and privileges which were conceived to belong to the former. In this way Aristotle was enabled to defend slavery as an institution just alike to the master and enslaved. It is true that these views may be held to be but emphatic statements of the undoubted natural, physical, and mental inequalities of men. Still, when we find no mention made of the spiritual equality of all mankind ; when man's whole ethical duty in this world is declared to be exhausted in an obligation to further the interests of his State ; when the immortality of the State is dwelt upon rather than that of the individual soul ; and when the individual's claim upon the State for recognition is wholly determined by these natural inequalities of mind and body,— when we consider all this, we can not avoid maintaining that these philosophers very nearly, if not actually, taught a doctrine of spiritual inequality.

The Stoics nearly approached the idea of the spiritual equality of all men, but did not actually reach it. Theirs was a doctrine of equality based upon the essential rationality rather than the spirituality of men. To them, all men, as participants in the world-reason, had an essential likeness and equality. They were thus able to teach a doctrine of cosmopolitanism as opposed to the narrow particularism of the Greek city-states. “Cosmopolitanism took the place of politics,” says Zeller, “and of this the Stoics were the most zealous and successful prophets. Since it is the similarity of reason in

the individuals on which all community among men rests, the two must be coextensive. All men are akin. They have all the same origin and the same mission. All stand under one law, are citizens of one state, members of one body. All men, as men, have a claim to our beneficence. Even slaves can claim their rights at our hands and show themselves worthy of our respect. Even to our enemies we, as men, owe clemency and ready support."

Stoicism was thus able to reveal to the ancient world a common humanity—a unity of the human race. This, however, was a unity only obtained by rejecting existing political divisions as immaterial and accidental, and predicating rationality as at once the common and essential characteristic of mankind. It was not a unity based upon a mutual charity, sympathy, and love, following from a conscious recognition that all men and women are moral beings, all the objects of a single divine and loving Will. In fact such an idea could not develop until a true doctrine of conscience had arisen, and this not even the Stoics had been able to create. "To the Stoic ethics belongs the glory," says Windelband, "that in it the ripest and highest which the ethical life of antiquity produced, and by means of which it transcended itself and pointed to the future, attained its best formulation."<sup>1</sup> This is true, and yet, as we now understand it, the Stoics failed to grasp the idea of moral obligation in its highest sense of requiring the being and doing of good for its own

<sup>1</sup> *History of Philosophy*, English translation, p. 176.

sake. To them, as to other Hellenic schools of thought, the good was ever something ultimately pleasant, and to be sought because it was such. They taught, to be sure, that the duty of obedience is not an obligation imposed from without, but a command given from within; but this command was conceived as based upon utilitarian grounds. Whatever apparent sacrifice was involved in the search for good, they believed was apparent and not real, inasmuch as the realization of a higher good was supposed more than to compensate for the immediate suffering or deprivation undergone. Thus, in fine, to put the matter in a nutshell, "The central problem of Greek ethics was not to determine the moral laws, but rather to find the chief good and the mode of conduct which would secure it. It was the doctrine of *goods*, rather than the doctrine of *duties*, which gave the keynote to the whole moral philosophy of the Greeks. With the Stoics, as with their contemporaries and opponents, the Epicureans, and with Aristotle before them, the aim was to determine the highest good of life."<sup>1</sup>

It was first in the doctrines of Christianity, especially as interpreted by the followers of St. Paul, that the true doctrine of spiritual equality was taught. In the common fellowship with Christ all became equal. In the Christian doctrines of charity, self-sacrifice, and obedience the true theory of conscience was revealed.

This idea of spiritual equality we state as a fact,

<sup>1</sup> French, *Concept of Law in Ethics*.

rather than as a result to be striven for in any scheme of distributive justice. It is a verity the recognition of which is apodictically impelled upon us by our reason. It is not a condition over which we can exercise any influence either to aid or prevent. Its recognition serves, therefore, to furnish us, not with a canon of desert, but with the fundamental reason for distributive justice. It is because all men are persons in this ethical, spiritual sense, that we owe it to ourselves as well as to others, to seek the establishment of an order in which the utmost possible justice shall prevail. In fine, then, we have thus far accepted the idea of equality as playing an essential part in our scheme of justice, only in the sense that all individuals are entitled to an equality of consideration. And this, after all, is but another way of expressing that idea of impartiality which we accepted in the beginning, and which finds expression in the command, "Be a person, and respect all others as persons."

**II. Natural Equality.**—In what we have had to say of spiritual equality, we have dwelt more or less upon the theory of natural equality. According to the theory of natural equality, strictly conceived, all men and women are naturally, that is, when born, substantially and potentially equal, physically and mentally. Whatever inequalities subsequently appear must, if we accept a doctrine of natural equality, be conceived to be due to differences in education and other objective conditions of life.

We are not acquainted with any writer who has

maintained the absolute congenital equality of all men, but there are many who have held that the natural differences are so slight that they may safely and properly be disregarded in the formulation of a just distributive scheme. Thus says Godwin: "In the uncultivated state of man, diseases, effeminacy, and luxury were little known, and of consequence the strength of every one much more nearly approached to the strength of his neighbor. In the uncultivated state of man the understandings of all were limited, their ideas and their views nearly upon a level."<sup>1</sup> To the following effect speaks also Hobbes: "Nature has made men so equal, in the faculties of the body and mind; as that though there be found one man sometimes manifestly stronger in body, or of quicker mind than another, yet when all is reckoned together, the difference between man and man is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend as well as he. For as to strength of body, the weakest has strength enough to kill the strongest either by secret machination, or by confederacy with others, that are in the same danger with himself. And as to the faculties of mind, setting aside the arts grounded upon words, and especially that skill of proceeding upon general and infallible rules, called science; which very few have, but in few things; as being not a native faculty, born with us; nor attained, as prudence, while we look after

<sup>1</sup> *Political Justice*, Book II, Chapter IV.

somewhat else, I find yet a greater equality amongst men than that of strength. For prudence is but experience; which equal time equally bestows on all men, in those things they equally apply themselves unto. That which may perhaps make such equality incredible, is but a vain conceit of one's own wisdom, which almost all men think they have in a greater degree than the vulgar; that is, that all men but themselves, and a few others, whom by fame or for concurring with themselves, they approve. For such is the nature of men, that howsoever they may acknowledge many others to be more witty, or more eloquent, or more learned; yet they will hardly believe that there be many so wise as themselves; for they see their own wit at hand and other men's at a distance. But this proveth rather that men are in that point equal, than unequal. For there is not ordinarily a greater sign of the equal distribution of anything, than that every man is contented with his share.”<sup>1</sup>

Adam Smith, in his *Wealth of Nations*, says upon this point: “The difference of natural talents in different men is, in reality, much less than we are aware of, and the very different genius which appears to distinguish men of different professions, when grown up to maturity, is not upon many occasions so much the cause as the effect of the division of labor. The difference between the most dissimilar characters, between a philosopher and a common street-porter, for example, seems to arise, not so much from nature,

<sup>1</sup> *Leviathan*, Chapter XIII.

as from habit, custom, and education. . . . By nature a philosopher is not in genius and disposition half so different from a street-porter as a mastiff is from a greyhound, or a greyhound from a spaniel, or this last from a shepherd's dog."<sup>1</sup> Proudhon comes the nearest of all in declaring the original mental equality of men when he says, "Talent is a creation rather than a gift of nature. . . . Without society, without the education and powerful assistance which it furnishes,— the finest nature would not be superior to the most ordinary capacities in the very respect in which it ought to shine."<sup>2</sup> In another place in the same work, however, Proudhon takes a contradictory position.<sup>3</sup>

We do not, of course, need to stop for any length of time to demonstrate the fact of the natural inequalities among men. It is sufficient to say that every recent advance of science has served to show these inequalities to be greater than was before supposed. As a matter of fact, indeed, as we have seen, none of the writers who have dwelt most earnestly upon this point have done more than maintain a substantial equality. No one has dared to assert an absolute equality. There are, however, two observations which should be made before we leave this subject.

In the first place, attention should be called to the fact that, in admitting the existence of natural dif-

<sup>1</sup> Book I, Chapter II.

<sup>2</sup> *What is Property?* Tucker translation, p. 198.

<sup>3</sup> See *post*, p. 64, note.

ferences of physical and mental powers among men, there is given no support to a theory that would hold it possible, or rational, to group men into privileged classes, according to the simple principle of birth in this or that family line. The degree to which heredity is influential in determining the character and capacities of the individual is not, perhaps, exactly ascertainable. But no grounds exist for maintaining this power to be so potent as to make it reasonably certain that the distinctive traits of an ancestor will be handed down to his descendants. By this we do not mean that social and political exigencies may not require the existence of an aristocracy of birth; but if they do, it will be these exigencies, and not the facts of individual desert, which justify the discriminations shown. That is to say, the need for a class of individuals enjoying special opportunities for personal development, and charged with the performance of special functions in the political or social economy of a given people, being granted, the mere fact of birth may be accepted in default of any other sufficiently definite principle of distinction. For the same reason an hereditary kingship may be maintained, not because it is thought to secure for a nation the best kings, but because it guarantees a definite principle of royal succession.

For an aristocracy with special privileges without corresponding special functions to perform, there would seem to be no possible justification. Nevertheless, aristocracies of precisely this character have

abounded in history. We are thus forced to ask, Upon what grounds were they justified in the eyes of the people among whom they prevailed ? Fundamentally, we must believe that these class distinctions have been recognized because of a more or less vague idea prevalent among the people that there is between the noble and base-born a distinction almost as essential as that between mankind and the lower animals. Otherwise there could hardly have been obtained that popular acquiescence, which for so long a time endured, in the economic and political advantages that were attached to the upper orders. When we find a divine right of kings to govern wrong widely admitted ; when to monarchs of notoriously evil lives we find supernatural powers ascribed, such, for example, as the "royal touch" for the cure of disease ; when we discover a Beaumarchais alleging as a justification for his aristocratic pretensions that he has taken the trouble to be born, and a French dame of high degree replying, when warned of the coming of the revolution, that "the Lord will think twice before he will allow the rights of the nobility to be endangered," — when we find such ideas held by the upper and accepted by the lower classes, we cannot but believe that, whether explicitly avowed or not, the position has been held that there are orders of men distinguished by differences which go deeper than personal capacities, and which thus separate them, *quâ* men, from one another.

The definite repudiation of such an idea has been more completely recognized in America than in the

countries of the Old World. At the same time it may well be questioned whether, to some extent at least, we have not swung the pendulum too far the other way; whether, in other words, in refusing to acknowledge the validity of pretensions based upon mere title or birth we do not, as a people, fail to give that recognition, and display that deference, which is properly due where individual worth has manifested itself. Do we not, in short, fail to show that respect which is owing to men of letters, to public-spirited citizens, or even to the individuals whom we have honored by selecting as our highest rulers of the State? And, on the other hand, is there not often found an improper deference paid to the man merely of wealth or of accidental prominence? The aristocratic principle, when properly interpreted, is a valid one. In every society there should exist an aristocracy of merit and individual worth. The old Platonic ideal of a society in which the wisest and best of its members exercise the controlling influence cannot in this respect be improved upon, and it may easily be a question for debate whether the existence of an aristocracy such as England has, which, though based upon birth, represents a class of citizens who recognize their obligations toward their State and their society, is not preferable to the total absence of any aristocracy whatsoever.

Leaving this subject of aristocracy, we turn to a still more important question which arises in connection with the fact of the natural inequalities of men. Granting that these inequalities exist—inequalities

due to no original merit or demerit on the part of the individuals subjected to them—does this fact impose any obligations upon the individuals who are the more favored, or upon society as a whole, to correct, in a measure at least, if possible, the disadvantages under which the more unfortunate of our fellow-beings rest?

As an abstract principle of justice, it would seem that, so far as the opportunity for self-development of these unfortunates is affected, it does. When we consider that all men are rational beings and moral potentialities, and thus fundamentally equal, one cannot escape from the conclusion that a perfect régime would be one in which all individuals would have an opportunity for the development and exercise of those capacities which, from the highest ethical standpoint, should be cultivated and employed. And if this be the ethical ideal, it necessarily follows that, so far as it lies within our power, we should strive for its attainment.

The recognition of this obligation does not, of course, commit us to anything resembling communism. This appears when we consider the difficulties that surround the practical application of the rule, and the specific duties that it implies. In the first place, it cannot be asked, at least so far as this one rule is concerned, that we individually, or society as a whole, should undertake the correction of any but the few inequalities which are obviously due to circumstances which have been beyond the control of those affected by them. Thus, even were this rule

of justice generally recognized and followed, there would still be left uncorrected all those inequalities that have been due to controllable causes. Furthermore, this rule alone places no obligation upon the individual to share with others those advantages which he has secured through his own efforts and without assistance from naturally superior abilities or environment. And, finally, this principle would imply neither a right on the part of the individual to demand an opportunity for the development and exercise of every talent which he may potentially possess, nor to ask that he be given exactly the same educational advantages, and be secured the same means for the employment of his physical and mental capabilities, as those enjoyed by his mates. According to the principles of justice which we have already established, the individual can claim from others as a right only those privileges which, when enjoyed, will promote his own best good ; and this best good, as we have also seen, must necessarily be interpreted in terms of the general good of all humanity. As for the character of the opportunities to be enjoyed by each individual respectively, this clearly must depend upon his special capacities. For example, the principle would not mean that the microcephalic idiot and the gifted genius should receive the same educational treatment. It would mean nothing more than that, so far as possible, that kind of opportunity for economic advancement or intellectual development should be given which is best calculated to actualize the powers potentially possessed. Further

still, it is to be recognized that, as has been already said when speaking of aristocracy, aside from any other considerations, a certain amount of inequality may be desirable upon grounds of social utility. As Professor Mackenzie has said: "If, indeed, all could be maintained at the highest level of human life, it would obviously be well that they should be so maintained. But the greatest advances in the condition of mankind have hitherto been made by a few individuals who have been able to develop particular kinds of ability in an exceptional degree; and even if it were true that such individuals have by nature no more ability than their fellows, it might yet be desirable among men, as among bees, that a few should be picked out from among the workers — whether by circumstances or by lot, or by some other mode of selection — to be sovereigns and leaders."<sup>1</sup>

One consequence, and a very important one, does, however, follow from the acceptance of the rule of justice of which we have been speaking. This is, that, when put into practice, the two ideas of charity and justice will lead to exactly the same conduct. In other words, justice when properly interpreted, and charity when properly applied, must lead to identical treatment of others. Psychologically the ideas of charity and justice are distinct. The one is based upon a sympathy which springs up spontaneously at the sight, or knowledge, of suffering. The other is a sense of obligation, resulting from a reasoned judgment as to what is

<sup>1</sup> *Introduction to Social Philosophy*, p. 287.

properly owed to another under the given circumstances. The one is, in a sense, emotional and impulsive; the other, intellectual. But not all emotions or impulses, even of sympathy, should be yielded to. This being so, there is the necessity of determining, intellectually, in each case, whether that which we are prompted by our tenderness of heart to do should be done. When we stop to ascertain this, we find that we have no right to extend charity except where it is deserved. But assistance is deserved only where the suffering has been, to some extent at least, unmerited, and where the help which is requested, or offered, is calculated, upon the whole, beneficially to affect the recipient. We are thus brought to the consideration of precisely the same facts as those which condition the rule of justice that we have been examining.

In truth, it is perhaps not incorrect to say that much that is charity in one age becomes recognized as simple justice in the next. We are wont to classify as deeds of justice only those acts toward others, the obligation for the performance of which is strongly and clearly felt by us. As, however, we broaden our intellectual and moral horizons, new duties are brought within our view, and many acts that before have seemed matters of grace and mercy appear, in the new and fuller light, as demands upon us for simple justice. Thus, in imagination at least, we can picture to ourselves a time when such perfect justice will be rendered, that true charity will find no material upon which to employ itself. When this

stage of development is reached, the idea of justice will not swallow up the feeling of sympathy for suffering, nor lessen the tenderness felt by the strong for the weak, but, where help is given, it will be given because it is deserved, and not for the sake of satisfying a desire which may or may not be a proper one. Under such conditions, even where no direct relations have ever existed between the giver and the receiver, the extending of aid will be deemed but a matter of simple justice. The individual, as a moral being, will be recognized to have the right to demand that, so far as it lies within human power, society shall be so organized as to give to all a due opportunity for happiness and growth. And, reciprocally, each individual will perceive that, so far as it lies within his might, it is his duty to bring it about that such opportunity is given.

**III. Civil Equality.**—This form of equality may be considered in comparatively few words. By civil equality is meant legal equality, the possession of equal rights in the sphere of private law by all the members of a given body politic. Such an absolute and universal equality has never been attempted in any system of jurisprudence, nor would it be possible of establishment without leading to the greatest evils. The reason for this is that not all individuals, irrespective of age or sex, are equally capable either of putting civil rights to their proper use, or of satisfactorily fulfilling the corresponding civil obligations. Thus in all communities, even in those where the doctrines of freedom and equality have received the

widest acceptance, we find minors released from many of the legal obligations that are placed upon adults, and, correspondingly, deprived of privileges or capacities which their majors enjoy. The same is true as to the respective legal competences of men and women, of persons *compos mentis* and persons *non compos mentis*. Where these distinctions are based upon actual differences in personal capacity, and have for their aim the securing of the greatest aggregate justice, rather than the creation of arbitrary distinctions, their existence is fully justified. In fine, then, though often spoken of as such, civil equality cannot be considered an ideal of justice. The nearest we can come to framing a rule of justice in this respect is to say that there should be substantial equality as to all individuals who are conceived to be, from an intellectual standpoint, able to exercise a sound discrimination in all matters with which the private law has to deal; and that exceptions to this rule should be made solely for the sake of securing greater legal protection to those who are not thus fully competent.

Civil equality such as this does not exclude the feature found in all systems of jurisprudence, that different subjects, and the rights of different classes of persons, should be examined and passed upon in different courts, and that each of these tribunals should have its own mode of procedure and special forms of relief. Thus in our own system of law, we assign certain causes of action to what are known as law or civil courts, while others are given to equity

courts, while still others are held to lie wholly within the jurisdiction of admiralty tribunals. So also we surrender to courts martial and other military courts or commissions the trial of offences committed by members of the military forces of the country, whereas all other crimes are triable only before the ordinary criminal tribunals. Likewise on the Continent, though not in England or the United States, matters connected with the administration of government are withdrawn from consideration by the ordinary courts of the country, and reserved for trial by specially established administrative tribunals. Here, too, so long as these distinctions are based upon considerations of approved expediency, no canon of distributive justice is violated.

A feature of modern systems of jurisprudence that is closely allied to, and in fact often confused with, the idea of civil equality, is the recognition of an equality of all persons before the law. By this is meant that when persons are brought before a court of justice for the interpretation or enforcement of their respective rights, the judgments rendered are to be determined wholly by the facts and law involved, and hence irrespective of the social, economic, political, or moral standing of the parties litigant. At first thought, this may seem unjustifiable. When, however, the true nature of law, and the object sought in its enforcement, is considered, it is seen to be eminently just. As we shall elsewhere have occasion to point out the proper province of law, it will be sufficient here simply to assert that by its very nature

and limitations the law is prevented from even attempting the determination, in individual cases, of ethical desert. The aim of law as a whole is, of course, to secure justice in an ethical sense; but, even where there is a certainty that wise and good judges can be secured, so various are the degrees of moral responsibility, so almost infinite are the considerations involved in estimating the depths of human merit, while so limited are the means which the law has at its command for the discovery of truth, it is generally recognized that, in the long run, the greatest amount of actual justice will be secured where the lawmaking body lays down in general terms the principles which the courts are to follow, and the latter apply them impartially in all cases where the facts are such as to bring them within the general terms of the rules thus legislatively determined.

**IV. Political Equality.**—By political equality is meant an equality of right to share in the direction of public affairs, either by way of holding office, or by selecting those who do.

Here there is obviously no good ground for demanding that the law should secure to all persons like privileges.

When an individual claims a political right, he is asking for an authority to participate in the making and executing, not simply of the laws by which he himself is to be governed, but of the laws which are to control the actions of others as well. Whatever may be the essential basis of the State's right

to be, a People has the undoubted right to demand as efficient a government as can be obtained. If this be so, no individual can claim a political authority or privilege as a right, save as he can demonstrate that he possesses both the capacity and the disposition properly to exercise it when obtained. The rule of justice here to be laid down is, then, the same as that stated in our second chapter; namely, that rights should be distributed according to the capacities and the dispositions of the individuals who are to exercise them.

In all nations where political rights are liberally granted, the attainment of a certain age is accepted as evidence of a mental capacity sufficient for the casting of an intelligent vote, or for the proper exercise of the duties which attach to a public office. Of course, however, no one believes that all citizens are not so qualified before attaining the given age, or that they are necessarily so qualified when they have attained it. As Amiel has said in his *Journal*, "The pretension that every one has the necessary qualifications of a citizen simply because he was born twenty-one years ago, is as much as to say that labor, merit, virtue, character, and experience are to count for nothing." The true reason for fixing such an arbitrary distinction as age is that, a general diffusion of political rights being considered advisable, and it being beyond the power of the government to ascertain in each individual case the capacities and character possessed, the granting of the rights in question to all

above a certain age, will, upon the whole, best attain the purpose sought.

What we have said as to age being a rough test of political ability, applies also in large measure to such other general criteria as ability to read and write or the ownership of a given amount of property. As regards the last qualification, however, the additional idea is sometimes present that there is thus selected a class who, besides capacity, will have a special interest in many of the matters which are to be passed upon.

Though there is no necessary connection between the wide diffusion of political rights, and a general recognition of an equality in private rights, the two are apt to go hand in hand. Between these two and the other forms of equality there cannot, however, be this much said. Political and legal equality may go hand in hand with the greatest of actual inequalities in wealth and social standing. Indeed, as Fitzjames Stephen points out in his *Liberty, Equality, Fraternity*, it is perfectly possible for a greater aggregate amount of equality to exist under a régime in which a strict legal, as well as social, caste system prevails, than in the most democratically organized of societies. For it may be that, while under the caste system a few broad and definite distinctions are drawn, within the great classes thus established, a very substantial equality of members obtains. On the other hand, where the progress of democratic ideas has resulted in the removal of all artificial restraints and barriers, and individuals compete socially, politically, and economi-

cally with one another according to their naturally given powers, a competitive struggle of such intensity may exist that the greatest of inequalities are brought about. Natural differences of ability and fitness being allowed to have their full influence, this is, indeed, apt to be the result. Given an unrestricted competition in any field of activity, such natural inequalities as exist among the competitors may be counted upon to make themselves evident in their most extreme form.

Nor does the general diffusion of political rights necessarily lead to an equal diffusion of political powers. As Stephen says: "Legislate how you will, establish universal suffrage, if you think proper, as a law which can never be broken, you are still as far as ever from equality. Political power has changed its shape, but not its nature. The result of cutting it up into little bits is simply that the man who can sweep the greatest number of them into one heap will govern the rest. The strongest man in some form or other will always rule. If the government is a military one, the qualities which make a man a great soldier will make him a ruler. If the government is a monarchy, the qualities which kings value in councillors, in generals, in administrators, will give power. In pure democracy the ruling men will be the wire-pullers and their friends." And again: "To try to make men equal by altering social arrangements is like trying to make the cards of equal value by shuffling the pack. Men are fundamentally unequal, and this inequality will show itself, arrange society as you like."

**V. Social Equality.**—“Social equality,” says Bryce, “denotes the kind of mutual courtesy and respect which men show to one another when each feels the other to be ‘as good as himself,’—a respect which stands between condescension, on the one hand, and submissiveness, on the other.” The recognition by one individual of the social equality of another with himself is an intense or intimate form of that “consciousness of kind” which lies at the basis of all social and political associations. As we have said before, we cannot conceive of men grouping themselves into more or less permanent unions for purposes of mutual aid and enjoyment, without there being in their minds a general feeling that they and their associates are members of one species, and have common natures and common desires. For mere purposes of military offence and defence and of economic coöperation, it is not necessary that this “consciousness of kind” should extend to more than the most general of those characteristics which distinguish races of men from one another, or men from animals. When, however, we advance to those higher circles of fellowship which are formed within the general sphere of a given society,—associations founded upon recognized likenesses of mind and character,—it is inevitable that men and women should be classified upon different planes of social value. Such distinctions are both natural and just. It is natural that differences in intellect, in education, and in character should lead to differences in taste, and that those of similar tastes should feel themselves more closely

akin than those of dissimilar natures. It is also just, for it is of the very nature of justice that due recognition should be given to essential superiorities or inferiorities. The only caution to be observed is that these distinctions should be differences of character and worth, and not accidental inequalities of body or economic condition. It is true, as Bryce says, that "the more social equality we can secure without running counter to nature the better"; but, "more harm than good will be done by trying to force men into a kind of intimacy which they feel to be unreal, because not grounded on sympathy of thought and tastes and habits."<sup>1</sup>

**VI. Economic Equality.**—By economic equality is of course meant equality in the possession of articles of material value,—in other words, of wealth. At this point we have to discuss only the question as to the extent to which the principle of absolute equality is to be accepted as a canon for the distribution of economic goods. The examination of all other rules for the attainment of justice in this respect will be made in a subsequent chapter.

Certain schools of communists declare that justice demands an absolute equality in distribution. In order that this result may be reached, they of course assert that almost, if not all, property should be owned in common. Furthermore, in order to render this equality more real and permanent, most communistic schemes require that the manner in which

<sup>1</sup> *Century Magazine*, July, 1888, article, "Equality."

these distributive shares are to be consumed shall be subjected to the control of the State.

Schemes of this sort, so far as regards the theoretical principles upon which they are based, may be roughly divided into two classes. First, there are those of the order of Plato's Republic, in which the welfare of the whole is so emphasized as to make that of the individual an almost negligible factor, and in which, therefore, the allegiance of the citizen to his State is conceived to be so important that all local affections, such as those which surround the family, are discouraged as tending to prevent that desired complete identification of the individual's interest with that of his State. Secondly, and more common, are those communistic schemes that are founded on the alleged abstract natural right of every person to as complete an economic and social equality as is practically possible.

The argument that has been made in a preceding chapter of this book has demonstrated the impropriety of such a surrender of the individual to the whole, or rather his absorption in it, as is called for by the Platonic ideal. And even if this were not so, the communal life such as Plato advocated would serve, as Aristotle immediately showed, rather to discourage than to promote intensity of civil allegiance.

Those communistic schemes which are economic rather than political in character, and which found the demand for absolute equality upon an alleged inherent right of all individuals to uniform treat-

ment, are represented in the systems of Babœuf, Cabet, and Proudhon. Babœuf was a representative of the communism of the French Revolution. The revolutionary society which he organized declared in the first article of its official manifesto that, "Nature has given to every man an equal right to the enjoyment of all goods." The conclusions drawn from this premise were that there should be an absolute equality in wealth and a uniformity in life. "The whole scheme," says Dr. Ely, "is dreary and monotonous. All differences save those relating to age and sex being abolished, equality is interpreted to mean uniformity. All must be dressed alike, save that distinctions are made for sex and age; all must eat the same quantity of the same kind of food, and all must be educated alike. As the higher goods of life are lightly esteemed, education is restricted to the acquirement of elementary branches of knowledge, and of those practical in a material sense. Comfortable mediocrity in everything is the openly expressed ideal."<sup>1</sup>

Cabet's ideal, while calling for community of goods and an equality of distribution, is of a superior order to that of Babœuf's in that marriage and family life are held sacred, higher education is advocated, and in general the value of æsthetic and intellectual pursuits recognized.

Proudhon, who strenuously denied that he was a communist in the sense that all wealth should be

<sup>1</sup> *French and German Socialism*, p. 30. See this work for an excellent account of the theories of Babœuf and Cabet.

publicly owned, was yet a communist in that he advocated absolute economic equality as an ideal. Dr. Ely says: "He was not a communist in the sense of favoring communities such as we see in a few places at present, because they involve control and authority. He was, on the contrary, in favor of anarchic equality. The distinction might be made by saying that he was a communist, but not a communitarian."<sup>1</sup> Strangely enough, Proudhon is able to deduce the rightfulness of absolute equality in distribution from the premise that rewards should be apportioned according to work done. This feature of his system we shall consider when we come to examine the labor theory of property. But his doctrine of equality may be considered at this point.

Proudhon does not deny that men and women differ widely both in mental and physical abilities, but declares that this should not lead to inequality of wage, and for the following reasons: In the first place, as he declares, mental differences as shown in varieties and degrees of talent and genius are due to, or at least their development is rendered possible by, social causes alone. Thus he says: "Rarity of function bestows no privilege upon the functionary, and that for several reasons, all equally forcible. (1) Rarity of genius was not, in the Creator's design, a motive to compel society to go down on its knees before the man of superior talents, but a providential means for the performance of all functions to the greatest advantage of all. (2) Talent

<sup>1</sup> *French and German Socialism*, p. 139.

is a creation of society rather than a gift of Nature ; it is an accumulated capital, of which the receiver is only the guardian. Without society,—without the education and powerful assistance which it furnishes,—the finest nature would be inferior to the most ordinary capacities in the very respect in which it ought to shine. The more extensive a man's knowledge, the more luxuriant his imagination, the more versatile his talent, the more costly his education has been, the more remarkable and numerous were his teachers and his models, the greater is his debt. The farmer produces from the time that he leaves his cradle until he enters his grave ; the fruits of art and science are late and scarce ; frequently the tree dies before the fruit ripens. Society, in cultivating talent, makes a sacrifice to hope. (3) Capacities have no common standard of comparison ; the conditions of development being equal, inequality of talent is simply specialty of talent.”<sup>1</sup>

Society, then, argues Proudhon, has the right to demand from each individual that he shall contribute to its welfare according to capacities which have been developed through its instrumentality. When all have done this, they stand upon a level plain of desert, and should be rewarded accordingly. Furthermore, in any civilized society all production is social. That is, not only are values socially determined, but production itself is dependent upon association. “The isolated man can supply but a very small portion of his wants ; all his power lies in asso-

<sup>1</sup> *What is Property?* Tucker translation, p. 198.

ciation, and in the intelligent combination of universal effort.”<sup>1</sup> Finally, Proudhon says, those who have special talents are sufficiently rewarded when they are given the opportunity of exercising their several abilities. “What,” he asks, “is the economical meaning of wages? The productive consumption of the laborer. The very act by which the laborer produces constitutes, then, this consumption, exactly equal to his production, of which we are speaking. When the astronomer produces observations, the poet verses, or the savant experiments, they consume instruments, books, travels, etc.; now, if society supplies this consumption, what more can the astronomer, the savant, or the poet demand? We must conclude, then, that in equality, and only in equality, St. Simon’s adage — ‘to each according to his capacity, to each capacity according to its results’ — finds its full and complete application.”<sup>2</sup>

<sup>1</sup> *Op. cit.*, p. 148.

<sup>2</sup> *Op. cit.*, p. 200. Elsewhere he declares, though this would scarcely seem necessary to, or even consistent with, his main argument, that, inasmuch as there is a limit to producible things, or at least to things socially useful, he who is able to finish his task in a shorter time than his fellow-workers should not be permitted to continue producing. “He who finishes before others may rest, if he chooses; he may devote himself to useful exercises and labors for the maintenance of his strength and the culture of his mind. This he can do without injury to any one; but let him confine himself to services which affect him solely.” And he adds, what is certainly contradictory to those paragraphs which we have quoted above, “Vigor, genius, diligence, and all the personal advantages which result therefrom, are the work of nature, and, to a certain extent, of the individual; society awards them the esteem which they merit: but the wages it pays to them is measured, not by their power, but by their production. Now the production of each is limited by the right of all.” (*Op. cit.* p. 125.)

The defects in Proudhon's reasoning lie upon the surface. The chief one is the unwarranted assumption that differences in kind and degree of talent are wholly due to social forces. There is, secondly, the error of supposing that at any one time the amount of goods needed or desired by a given society is of such a limited character that to permit the rapid worker to produce to the extent of his capacity will prevent others from finding, *pro tanto*, the employment to which they are justly entitled. Aside, however, from the above assumptions, no good ground is put forward for denying that rewards should be apportioned according to diligence displayed. Proudhon, in fact, later on recognizes that where laziness is exhibited by the worker, his share should be proportionally reduced. But to faithfulness and diligence he denies the opportunity for increased reward. But this can be just only if this spirit of faithfulness and diligence be, as is claimed of talent, the result of social forces. But such a position Proudhon does not, and cannot, take.

Besides the above, there are, of course, all the general objections to communism, such as difficulties of organization, and failure to furnish such incentives to effort as are indispensable for the securing of even moderate productive efficiency.

Godwin in his *Political Justice* preaches a doctrine of distributive equality, but bases it, not upon the principle that all men have a natural right to equality of treatment, but upon the claim that justice demands that want-satisfying commodities should be

distributed according to intensity of needs, and that, in a properly ordered and enlightened society, legitimate wants would be so evenly distributed that an approximate equality in the apportionment of economic goods would be the result. We shall discuss Godwin's theories more fully when we examine the validity of the "want theory" as a basis of distributive justice.

Reasoning from the discussion that has gone before, it is easily shown that, as an abstract principle, the idea of equality in economic goods is of little value. As we have already learned, the rights to which individuals may properly lay claim differ according to the conditions of time, place, the purpose for which they are to be used, and the capacities and dispositions of the individuals themselves. If this be so, then, of course the amounts of wealth which different individuals may justly demand the enjoyment of, must vary. This point will appear more plainly when we come to consider what we conceive to be the true canon of distributive justice.<sup>1</sup>

It is not simply in transcendental systems of ethics, however, that the idea of economic equality becomes invalid as an abstract principle. The same is true if the matter be viewed from the purely utilitarian standpoint. Utilitarianism, whether logically or not, has been made to assume two forms. On the one hand, it has been made to mean that advantage to the individual should be the one aim sought in human conduct. On the other hand, it has been made to

<sup>1</sup> See Chapter VII.

assert that the social welfare should be the result striven for. In each case, however, the welfare, whether individual or social, is declared desirable wholly because of the pleasure which attends it. Hence the moral value of acts is estimated by their power to produce pleasure.

If we argue from the individualistic utilitarian standpoint, it is seen, in the first place, that, strictly speaking, the idea of justice in the distribution of economic goods can have no other meaning than as a rule bidding each individual to seek for wealth in so far as his happiness is bound up in its acquisition. No possible standing ground is, therefore, open for the principle of equality. For if it be the duty of each individual to seek first his own happiness, how, logically, can he be held obligated to refrain from any act that will further that end, whether inequalities in the distribution of property be the result or not?

If we argue from the social standpoint, the reasonable rule is seen to be that laws should, so far as possible, apportion wealth, not according to the principle of equality, but according to needs; for where the want is most intense, the pleasure produced by its satisfaction is the greatest. What, then, is the meaning of the Benthamistic formulæ, "every one to count for one, and no one for more than one," and "the greatest happiness to the greatest number"? As regards the first formula, there is a validity where it is intended to mean the same as the Kantian phrase that every human being is to be

treated as a person,—as constituting a single moral unit. But when it is employed, as it so often is, to signify that equality is the principle upon which pleasures should be distributed, the rule becomes invalid, and, in fact, implies an assumption of the equality of mankind similar to that which has played so prominent a part in all *a priori* systems of natural rights.<sup>1</sup> There is, as Ritchie points out, only one way in which, upon utilitarian grounds, the formula may be justified as a rule for practice. “That ‘every one should count for one, and nobody for more than one,’ can, indeed, be defended on utilitarian grounds as the only way or the easiest way of escaping from the difficulty of distinguishing exactly between the needs and merits of individuals, and of arresting the discontent that arises from a suspicion of injustice.”<sup>2</sup>

Again, the principle, “the greatest good to the greatest number,” is inconsistent with the formula of the equality of all men, in that the greater aggre-

<sup>1</sup> “For practical purposes the principle that, in the estimate of the resulting happiness by which the value of an action is to be judged, ‘every one should count for one, and no one for more than one,’ yields very much the same direction as that of the formula employed by Kant for the statement of the Categorical Imperative, which has probably always commended itself most to readers alive to the best interests of their time: ‘Act so as to treat humanity, whether in your own person or in that of others, always as an end, never merely as a means.’ We say for practical purposes, because, as strictly interpreted, the one by a Benthamite, the other by a Kantian, the significance of the two formulae is wholly different. The Benthamite would repudiate or pronounce unintelligible the notion of an absolute value in an individual person. It is not every person, according to him, but every pleasure that is of value in itself.” — GREEN, *Prolegomena to Ethics*, § 214.

<sup>2</sup> *Natural Rights*, Chapter XII.

gate of pleasure may often be secured by dividing a given object of desire among a few, or by giving to some a greater amount than to others, rather than by distributing it equally in small shares among all. Thus, for example, if a government were serving out meals, an equal amount of food given to all, irrespective of their needs, might easily result in a surfeit to some, while others were left unsatisfied. In this way the application of the rule that "every one should count for one, and nobody for more than one" would render impossible the realization of the greatest good called for by the second rule. The same difficulty in satisfying the requirements of both rules is seen when we turn to the problem of properly distributing intellectual and æsthetic goods. It can scarcely be doubted that in any society it is desirable that a certain amount of intellectual and artistic culture should be provided which, however, is of such advanced character that its attainment is practically possible to but a small portion of the entire community.<sup>1</sup>

If, from the Benthamistic or egoistic form of utilitarianism we turn to the universalistic or social form of the theory, as best represented in the writings of John Stuart Mill, we find logically necessary the same repudiation of equality as an absolute principle. According to Mill, "It is quite compatible with the principles of utility to recognize the fact that some kinds of pleasure are more desirable than others."

<sup>1</sup> Cf. *Economic Review*, I, 466, and II, 161; two articles by Mr. Rashdall entitled "Justice."

This being so, Mill goes on to declare that the pleasure that is felt by the individual when he sees the welfare of society advanced, is of a higher and more desirable order than self-gratification at the expense of the good of the whole. It is generally recognized that in thus admitting forms of happiness that differ one from the other in value, Mill, in fact, abandons the utilitarian theory. For the kernel of the utilitarian theory is that pleasure is the sole good to be sought, and hence that the pleasure-provoking power of a given line of conduct is the only test as to whether or not it should be entered upon. But if pleasures may be considered as of varying values, an entirely new test of morality is introduced, namely, that in accordance with which such values are determined. Thus, in truth, Mill's doctrine, so far as its practical precepts are concerned, is no longer hedonistic, and the duties which it inculcates may easily be made to agree with those which a transcendental system of ethics develops.

There is, however, another criticism that may be made upon Mill's theories. Maintaining, as he does, that social expediency is the one aim to be sought, it would seem that, logically, he should declare equality to be just only in so far as its effects are beneficial. Mill says, "All persons are deemed to have a right to equality of treatment except where some recognized social expediency requires the reverse, and hence all social inequalities which have ceased to be considered expedient assume the character not of simple inexpediency, but of injustice." This implies

that there is a presumption in favor of equality, whereas, if we are to place ourselves upon purely utilitarian grounds, there should be no presumption either way. To be unjust, an inequality must not simply cease to be socially useful, but must be positively inexpedient. Upon utilitarian grounds an inequality to which can be traced no influences either for good or for bad cannot stand condemned, any more than can a given equality similarly neutral in its social effects. And this, logically, must be the position maintained, whether or not such inequality or equality be due to some merit or demerit on the part of the individual affected. Upon this point Green writes: "Upon hedonistic principles it will only be as 'supposed equal in degree' that one person's happiness, *i.e.* his experience of pleasure, is to count for as much as another's. Now, as the ascertainment of this equality in degree between the happiness of one man and that of another is practically impossible, and as there is every reason to think that different men are susceptible of pleasure in most different degrees, it is hard to see how the formula, thus interpreted, can afford any positive ground for that treatment of all men's happiness as entitled to equal consideration for which the utilitarians have in practice been so laudably zealous. The most that could be deduced from it would be some very general condemnation of those fixed class distinctions which, by interfering with the free pursuit of pleasure on the part of unprivileged persons, would seem to lessen the aggregate of pleasure

resulting on the whole. Under it a superior race or order could plead strong justification, not indeed for causing useless pain to the inferior, but for systematically postponing the inferior's claims to happiness to his own. Certainly no absolute rule could be founded on it prohibiting all pursuit of happiness by one man which interferes with the happiness of another, or what we commonly call the oppression of the weaker by the stronger; for, the stronger being presumably capable of pleasure in a higher degree, there could be nothing to show that the quantity of pleasure resulting from the gain to the stronger through the loss to the weaker was not greater than would have been the quantity resulting if the claims of each had been treated as equal."<sup>1</sup>

The chief merits that have been claimed for the utilitarian system have been, first, its insistence upon the doctrine of equality, and, secondly, the practical, *i.e.* apparently easily ascertainable, character of the test that it provides for evaluating moral worth. As regards the first, it is undoubtedly true that the influence of the theory has been influential in many cases in bringing about the destruction of arbitrary distinctions. At the same time, as we have just seen, in so far as it has had this influence, it has had it, not because of the logical demands of the system, but, very often, in violation of them. As regards the second merit claimed, here also the influence of utilitarianism has been for the good in many cases, in that it has demanded of *de facto* institutions and laws

<sup>1</sup> *Prolegomena to Ethics*, § 214.

that they should justify their right to be, if they could, by showing that they were for the good of mankind. As a matter of fact, however, we find, when we attempt to ascertain the propriety of particular acts according to utilitarian principles, that, so far from furnishing us with easily ascertainable criteria, the considerations logically involved are for the most part quite beyond our powers of determination. Here again we may quote from Green: "Is it really possible," he says, "to measure the addition to the pleasure of others, or diminution of their pains, that would be caused by the agents abstaining from any . . . act? . . . The loss of pleasure would vary indefinitely with different persons; it would be different in the same person at different times. . . . How can we be sure that, in all or most cases where such actions are done, the certain loss of pleasure or increase of pain to each individual which, taking him as he is on occasion of each action, would be implied in his acting otherwise than he does, would be so overbalanced by increase of pleasure or decrease of pain to others, that the total sum of pleasure enjoyed by the aggregate of men, taking them as they are, would be greater than it is?"<sup>1</sup>

On the other hand, moreover, it is impossible to tell how much evil the utilitarian system has wrought by confusing men's ideals, by holding forth false motives, by causing the immediate good to be preferred to the more remote, and by encouraging (in fact, if not in theory) the search for the lower and

<sup>1</sup> *Op. cit.*, § 344.

more material pleasures, rather than the happiness that attends the cultivation of our æsthetic, intellectual, and truly moral capacities.

Summarizing our objections to economic equality as an absolute principle, we find them to be the following: first, the element of individual desert is wholly disregarded; secondly, no principle is provided for correcting natural and unmerited inequalities; thirdly, the same amounts of goods have different values to different individuals; fourthly, in many cases inequality, though not based on differences in individual merit, is socially beneficial.

The foregoing discussion has served to show the invalidity of the principle of absolute equality as a canon of distributive justice, whether viewed from the idealistic or utilitarian standpoint. We may, however, in addition, call attention to the fact that the principle, even were it not false in theory, would be practically impossible of maintenance in practice.

If the idea of absolute equality in treatment were accepted as the governing principle, justice would demand, not simply that the distributive shares of the products should be equal, but that the work by which the products are obtained should be apportioned by the same standard. The practical incapacity of any governing body to perform this task is clearly brought out by J. S. Mill in one of his essays. "It is a simple rule," he says, "and under certain aspects a just one, to give equal payment to all who share in the work. But this is a very imperfect justice unless the work also is apportioned equally. Now the many

different kinds of work required in every society are very unequal in hardness and unpleasantness. To measure these against one another, so as to make quality equivalent to quantity, is so difficult that communists generally propose that all should work by turns at every kind of labor. But this involves an almost complete sacrifice of the economic advantages of the division of employments, advantages which are indeed frequently overestimated (or rather the counter considerations are underestimated) by political economists, but which are nevertheless, in the point of view of productiveness of labor, very considerable, for the double reason that the coöperation of employment enables the work to distribute itself with some regard to the special capacities and qualifications of the worker, and also that every worker acquires greater skill and rapidity in one kind of work by confining himself to it. The arrangement, therefore, which is deemed indispensable to a just distribution would probably be a very considerable disadvantage in respect of production. But further, it is still a very imperfect standard of justice to demand the same amount of work from every one. People have unequal capacities of work, both mental and bodily, and what is a light task for one is an insupportable burden to another. It is necessary, therefore, that there should be a dispensing power, an authority competent to grant exemptions from the ordinary amount of work, and to proportion tasks in some measure to capabilities. As long as there are any lazy or selfish persons who like better to be

worked for by others than to work, there will be frequent attempts to obtain exemptions by favor or fraud, and the frustration of these attempts will be an affair of considerable difficulty, and will by no means be always successful.”<sup>1</sup>

The above is, of course, but one of the many difficulties in the organization and administration of a communistic society. Such other evils as would inevitably arise from the persistence of rivalries for personal reputation and power, from the discouragement, or at least lack of encouragement, of the higher forms of activity, from the loss of effective stimulus to industry and concentration of effort, from undue increase of population, from the dullness and monotony of life necessarily attendant upon a scheme of absolute equality,—such evils and many others suggest themselves at the very first thought. Despite these defects and difficulties, however, Mill, in his *Political Economy*, makes the following oft-quoted declaration: “If,” he says, “the choice were to be made between communism with all its chances, and the present state of society with all its sufferings and injustices, if the institution of private property necessarily carried with it, as a consequence, that the produce of labor should be apportioned as we now see it, almost in an inverse ratio to the labor,—the largest portions to those who have not worked at all, the next largest to those whose work is almost nominal, and so in descending scale, the remuneration dwindling as the work grows

<sup>1</sup> “The Difficulties of Socialism,” *Fortnightly Review*, April, 1879.

harder and more disagreeable, until the most fatiguing and exhausting bodily labor cannot count with certainty on being able to earn even the necessities of life,—if this, or communism, were the alternative, all the difficulties, great or small, of communism would be but as dust in the balance. But to make the comparison applicable, we must compare communism at its best with the régime of individual property, not as it is, but as it might be made. The principle of private property has never yet had a fair trial in any country.”<sup>1</sup>

The idea of Equality being repudiated as an abstract principle of justice, the true principle or principles of desert must be found in the idea of Proportionality; that is, in the proportioning of rewards in each particular case according to some ascertainable conditions of time, place, or person. The different canons of justice that have been based upon this idea we shall presently consider. First, however, we must examine the idea of property.

<sup>1</sup> Book II, Chapter I.

## CHAPTER IV

### PROPERTY

THE idea of property lies at the very basis of the political, legal, and economic sciences. In economic science, dealing largely with exchange values, the idea of ownership is involved in almost all of its reasonings, and implied in all of its laws. In jurisprudence, with its rules directed to the regulation of the rights arising out of the quiet possession and enjoyment of articles of value, the idea of ownership is still more fundamental. While in political science the protection of property is ranked along with protection of person as one of the chief purposes for which government exists. It is the aim of this chapter to examine somewhat carefully this idea of ownership, in order that we may discover both the real meaning of the conception, and the ethical justification, if there be one, for permitting particular individuals to exercise exclusive rights over objects of value.

In tracing the history of theories of property we find that the right of ownership has been based by different writers upon a variety of abstract principles. The chief of these have been those of

first occupancy, law, labor performed, and needs. Whether it be proper to accept any one of these as absolutely valid, we shall now consider.

**Occupation Theory.** — This is a theory which, strictly interpreted, means that he who first gains actual possession of an article of value should be considered its rightful owner, and should not be disturbed by others in its possession or enjoyment. In a settled society, where practically every article of value, which is susceptible of private appropriation, has been taken possession of by some one, the occupation theory has obviously little opportunity for application. As a matter of fact the theory has mainly been held to explain how, in a state of nature, it was possible for private property rights to be created which it was the moral duty of men to respect. Even there, however, the theory has been held as applicable only to those articles of value which are considered the direct gifts of God or nature. The right of the individual to that which he has made by his own labor is not denied, but the right to the material upon which his labor is expended has been based upon the fact of his first taking possession of it.

As would naturally be expected, we find the occupation theory especially dwelt upon by those writers who have founded their ethical and political systems upon the idea of an original state of nature. A typical view is that of Grotius. "God gave the human race generally a right to the things of a lower nature," says Grotius. ". . . Everything was com-

mon and undivided, as if all had one patrimony. Hence each man might take for his use what he would, and consume what he could. What each one had taken, another could not take from him by force without wrong. Cicero compares this state of things to the theatre, which, though it be common, yet when a man has taken any place it is his. And this state might have continued if man had remained in great simplicity, or had lived in great mutual goodwill. In sacred history we learn why it was that men departed from the community of things, first of movables, then of immovables; namely, because when they were not content to feed on spontaneous produce, to dwell in caves, to go naked or clothed in bark or in skins, but had sought a more exquisite kind of living, there was need of industry, which particular individuals might employ on particular things. And as to the common use of the fruits of the earth, it was prevented by the dispersion of men into different localities, and by the want of justice and kindness which interfered with a fair division of labor and sustenance. And thus we learn how things became Property; not by one act of the mind alone: for one party could not know what another party wished to have for its own, so as to abstain from that; and several parties might wish for the same thing; but by a certain fact, either expressed, as by division, or tacit, as by occupation: for as soon as community was given up, and while division was not instituted, it must be supposed to have been a matter of agreement among all, that

what each had occupied he should have for his own.”<sup>1</sup>

Here, as seen, occupation is conceived to create the ethical right to ownership, the idea of a contract, tacit or expressed, being introduced only to render fixed and secure the particular rights that have arisen. That is to say, the right of private possession and use is created by occupation, and by contract this is transformed into property.

The views of Grotius are substantially reproduced by Puffendorf, Wolff, Vattel, and Burlamaqui.

Rousseau gives only a qualified adherence to the occupation theory. Thus he says: “The right of the first occupant, although more real than that of the strongest, does not become a true right until after the establishment of that of ownership. Every man has naturally a right to everything that is necessary to him, but the positive act which makes him proprietor of certain property excludes him from the rest. His part being taken, he must limit himself to it, and has no further right to the community. . . . In general, to authorize the right of the first occupant upon any territory, the following conditions are necessary: first, that the land shall never have been occupied; second, that only such a quantity be occupied as will be necessary for subsistence; third, that it be taken possession of not by an empty ceremony, but by labor and cultivation, the only sign of ownership which, in default of legal title, should

<sup>1</sup> *The Laws of War and Peace*, Whewell translation, Book II, Chapter II, section 2, paragraphs 1, 4, and 5.

be respected by others. In fact, in according to necessity and labor the right of the first occupant, is it not going as far as would be justifiable?"<sup>1</sup>

**Criticism of the Occupation Theory.**—So far as the theory is dependent upon the postulation of rights in a completely non-social and non-civil state, it is of course subject to the general criticisms which may be made to such a premise. But that which is absolutely decisive as to the invalidity of the occupation theory is that it selects as a basis for a right a fact that may be, and in truth often is, brought about by simple chance, fraud, or open force. Where first occupancy has been due to any or all of these agencies, surely no moral right can be created.<sup>2</sup> If this be so, then, if for no other reason, simple occupation cannot be accepted as an abstract principle of right. Finally, it is to be observed that that for which we are seeking is a principle of distributive justice applicable to conditions as they now are. The occupation theory, even if accepted, so far from furnishing a standard for the correction of present distributive injustices, renders it absolutely impossible, except in the rarest cases, to ascertain

<sup>1</sup> *The Social Contract*, Book I, Chapter IX.

<sup>2</sup> At first thought it may seem that a moral right to property may sometimes be brought about by simple chance, as, for example, where a man accidentally stumbles upon a rare gem in an uninhabited desert. The utility of providing that, under such circumstances, the article found shall be the property of the finder, is ordinarily apparent. Apart, however, from the need of some rule which shall determine ownership in such cases, and especially of one which, at the same time, will stimulate men's alertness, one cannot see that any moral rights have been created; that is, rights which may not be set aside if some other and stronger considerations of utility arise.

the rightfulness of any proprietary rights whatever. For it is clearly impossible, as to almost all forms of wealth, to discover who were the first occupants, and from them to trace by legitimate transfer or descent the persons now entitled to ownership.

**The Legal Theory.** — There are a number of writers who have quite generally been credited with the theory that the civil law is able to furnish not only the legal, but the ethical, basis for the institution of property. Among these are Montesquieu, Hobbes, Bentham, and Rousseau. Upon first inspection, the language of these writers does seem to warrant the opinion that this is their view. When the thought is carefully analyzed, however, it will be found, we think, that a different construction is not only possible, but required.

Montesquieu asserts: "Just as men abandoned their natural independence to live under political laws, they renounced their natural community of goods to live under civil laws. By the first, they acquired liberty; by the second, property." As a statement of the origin of property as a legal institution, objection cannot, perhaps, be made to this. But when we read farther, it seems as though Montesquieu believed that the mere fact that a property right has been once established by law is sufficient reason why, as a matter of justice, it should never be disturbed. Thus he says: "Cicero maintains that the agrarian laws were unjust, because the community was established with no other view than that every one might be able to preserve his property.

Let us, therefore, lay down a certain maxim, that whenever the public good happens to be the matter in question, it is not for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by a law or a political regulation. In this case we should follow the rigor of the civil law, which is the palladium of property.”<sup>1</sup>

Properly construed, however, there is no assertion in the above that in the *ipse dixit* of the law is to be found the ethical justification of property. That which is declared is simply that, so important is it in social and political life that property rights should be preserved, a case cannot be conceived in which, for the sake of securing some other public good, it will be wise to destroy ownership as secured by law. As Montesquieu elsewhere says, “The public good consists in every one’s having his property, which was given him by the civil law, invariably preserved.”

Hobbes’s views as to property much resemble those of Montesquieu. “For where there is no commonwealth,” he says, “there is, as hath been already shown, a perpetual war of every man against his neighbor, and therefore everything is his that getteth it, and keepeth it by force; which is neither ‘propriety’ nor ‘community’; but ‘uncertainty.’ Which is so evident that even Cicero, a passionate defender of liberty, in a public pleading, attributeth all propriety to the civil law. ‘Let the civil law,’ saith he, ‘be once abandoned, or but negligently guarded, not to say oppressed, and there is nothing that any man

<sup>1</sup> *Spirit of Laws*, Book XXVI, Chapter XV.

can be sure to receive from his ancestor, or leave to his children,' and again, 'Take away the civil law, and no man knows what is his own, and what another man's.' Seeing, therefore, the introduction of 'propriety' is an effect of commonwealth, which can do nothing but by the person that represents it, it is the act only of the sovereign; and consisteth in the laws, which none can make that have not the sovereign power."<sup>1</sup>

Hobbes, in effect, founds his doctrine of absolute obedience to any *de facto* government upon the utilitarian ground that, so vital to man's happiness is the existence of a political order, any act, the tendency of which is to disturb that order, must be inimical, not only to the welfare of all, but to the true good of the individual or the individuals committing it. Such an act he therefore declares to be not simply legally, but morally wrong, for, as he holds, it is man's ethical duty to seek his own happiness. Hobbes does not deny that particular laws, taken by themselves, may be unwise or even unjust, but, he declares, that, in the first place, few individuals are capable of judging correctly and impartially as to the wisdom or equity of a law; and, in the second place, even if this were not so, it is impossible to abstract a given law from the general body of sovereign commands, or to refuse obedience to it, without at the same time weakening, to that extent, the general habit of political obedience. But, so transcendently important is it that this general spirit of political subordination should

<sup>1</sup> *Leviathan*, Chapter XXIV.

not be lessened or destroyed, no evil which a governor or a law can do will be equal to the harm which will follow from a diminution of political authority. Hobbes holds, therefore, as a logical consequence, that the dictum of the law should, in every case, be accepted by the citizen as binding upon him both morally and legally.

It is upon these premises that Hobbes declares that it is not necessary to go behind the dictum of the law for a justification of property. Property as a legal institution is to be respected for the same reason that all legal institutions are to be respected, because they are supported by the State, and any attack upon them is, to that extent, an attack upon the State itself.

When we turn to the views of Bentham we find much the same ground taken, except that Bentham by no means admits that the need of avoiding even the first steps toward anarchy is so absolute that no circumstances can be conceived in which a violation of a legal command will, upon utilitarian grounds, be ethically justifiable. The general beneficence of the laws which secure men in the possession of their property is, however, fully recognized by him. The following quotation from his *Principles of the Civil Code* presents his position so fully that little comment will be necessary. "The idea of property," he says, "consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this per-

suasion, can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is the law alone which permits me to forget my natural weakness. It is only through the protection of the law that I am able to enclose a field and to give myself up to its cultivation with the sure, though distant, hope of harvest. But it may be asked, What is it that serves as a basis to law upon which to begin operations when it adopts objects which under the name of property it promises to protect? Have not men in a primitive state a natural expectation of enjoying certain things—an expectation drawn from sources anterior to law? Yes. There have been from the beginning, and there always will be, circumstances in which a man may secure himself, by his own means, in the enjoyment of certain things. But the catalogue of these cases is very limited. The savage who has killed a deer may hope to keep it for himself so long as his cave is undiscovered, so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law. A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. That which in the natural state was an almost invisible

thread, in the social state becomes a cable. Property and law are born together and die together. Before laws were made there was no property ; take away laws and property ceases.”<sup>1</sup>

Here we have luminously and exactly set forth the part played by law in the creation and maintenance of property. The only criticism that may be made is that it is not made sufficiently plain that the whole idea or meaning of property is not summed up in its legal character. Private ownership of property may exist, not only as a moral right, but as a concrete fact, without the support of law.<sup>2</sup>

The theories of Rousseau as to the nature of prop-

<sup>1</sup> *Op. cit.*, Chapter VIII.

<sup>2</sup> There is thus considerable force in the criticism which M. Charles Comte makes when he says: “According to Montesquieu and Bentham it is civil laws which give rise to property, and it is clear that both mean by civil laws the decrees of public power which determine the possessions which each one may enjoy and dispose of. It would, perhaps, be more correct to say that it is property which gave birth to civil laws ; for it is hard to see what need a tribe of savages, among whom no property of any kind existed, could have for laws or of a government. The guarantee of property is undoubtedly one of the most essential elements of which it is composed ; it increases the value of property, and assumes its duration. A great mistake would be made, however, were it supposed that this guarantee were all there is of property ; the civil law furnishes the guarantee of property, but it is human industry which gives birth to property. Public authority is needed only to protect it and assure to all the power of enjoying and disposing of it. . . . Were it true that property exists or is created by decrees and the protection of public authority, it would follow that the men who, in any country, were invested with the power of legislation, would also be invested with the power of creating property by their decrees, and could, without committing injury to the right of property, despoil some persons of it to the advantage of others. They would have no other rules to follow than their own desires or caprices.” Quoted in Lalor’s *Cyclopædia of Political Science* ; article, “Property.”

erty and its justification are contained in the following extracts from his *Social Contract*. "What man loses by the social contract [i.e. by the establishment of political government]," he says, "is his natural liberty and an unlimited right to anything that tempts him which he can obtain; what he gains is civil liberty and the ownership of all that he possesses. Not to be deceived in these compensations, we must distinguish the natural liberty, which has no limits but the strength of the individual, from civil liberty, which is limited by the general will; and possession, which is only the effect of the force or right of the first occupant, from the ownership which is founded upon a positive right. Each member of the community gives himself to it, as soon as it is formed, such as he then is, himself and all his force of which his property forms a part. . . . What is singular in this alienation is that, so far from despoiling the individual, in accepting his property, the community assures him of its legitimate possession, it changes usurpation into a veritable right, and enjoyment into ownership. The owners now being considered as depositaries of the public property, their rights being respected by all members of the state and maintained by all their force against the stranger,—by a transfer which is advantageous to the public and more so to themselves,—they have, so to speak, acquired all that they have given. . . . It might happen, too, that men began to unite together before possessing anything, and that, taking possession of a territory sufficient for all, they enjoy it

in common, or divide it among themselves either equally or in proportions established by the sovereign. In whatever way the acquisition be made, the right which each individual has over his own property is subordinated to the right which the community has over all; without this there would be neither solidity in the social tie, nor real force in the exercise of sovereignty."<sup>1</sup>

Here it is quite evident that in founding property upon law Rousseau takes practically the same position that Bentham, Hobbes, and Montesquieu have assumed; namely, that it is only as an institution made secure by the protection of the political authority that the foundation of property is to be found in the law. In fact, as Rousseau goes on to maintain, the ethical right to ownership is to be found in occupation, when begun and maintained according to the principles which he lays down. Of this we have already spoken.

The general beneficence of the law in guaranteeing to owners of property a secure possession and quiet enjoyment is so obvious that few there are who explicitly deny it. Pure anarchists must, however, be considered as taking this position; for with the abolition of all political control law disappears, and with it, of course, all legal property rights. In taking this position, the anarchists are not necessarily led to advocate the destruction of private property rights in an ethical sense. Their contention only goes to the length of maintaining that the coer-

<sup>1</sup> *Op. cit.*, Book I, Chapters VIII and IX.

cive authority of the law is not needed for their maintenance. This, they hold, may be secured by mutual agreement and coöperation.

Besides the anarchists, there have been some writers who have taken the extreme position of holding that, so wholly are the laws which protect private ownership in the interest of the property owning classes, it would be better for the propertyless classes did no legal property rights whatever exist. The argument is that only those derive benefit from the law's protection who own property, and that thus the propertyless not only secure no benefit, but are prevented by the law from exercising those natural rights of acquiring riches by occupation or force which they would have in a non-civic state. Thus Rousseau says in the same chapter from which we have quoted above, "I will finish this chapter and this book by a statement, which must serve as a basis of all social systems; it is that, instead of destroying natural equality, the fundamental compact substitutes, on the contrary, a moral legitimate equality for that which nature may have given of physical inequality among men; and while they may be unequal in strength or genius, they become equal by agreement and right." But he adds in a note, "Under bad governments this equality is only apparent and illusory; it serves only to maintain the poor in misery and the rich in his usurpation. In fact laws are always useful to those who possess, and injurious to those who have nothing, from which it follows that the social state is advantageous to man only when

he has some property, and that no one has too much." Thus also Adam Smith, in his *Wealth of Nations*, says, "Civil government, so far as it is instituted for the security of property, is in reality instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all."<sup>1</sup>

If we are to understand, as indeed it would seem we must understand, that Rousseau and Smith held that it is disadvantageous to the propertyless that any legal property rights whatever should be recognized, an answer is easily made. This has been done by Bentham in one of the few passages where he departs from his usual dryness and prolixity of style, and rises to fervor and actual eloquence. "But perhaps," he says, "[it may be alleged that] the laws of property are good for those who have property, and oppressive to those who have none. The poor man, perhaps, is more miserable than he would be without laws." To which Bentham replies, "The laws, in creating property, have created riches only in relation to poverty. Poverty is not the work of laws; it is the primitive condition of the human race. The man who subsists only from day to day is precisely the man of nature — the

<sup>1</sup> *Op. cit.*, Book V, Chapter I. Rousseau, in his essay on the *Origin of Inequality*, says: "The first man who enclosed a piece of land and said, 'This is mine,' and found people simple enough to believe him, was the real founder of the bourgeoisie. How much misery, crime, war, etc., would have been prevented if another man had had the courage to pull out the posts and had said, 'Take care, cheat! You are lost the moment you forget that the fruits of the earth belong to all and the earth itself to no one!'"

savage. The poor man, in civilized society, obtains nothing, I admit, except by painful labor ; but, in the natural state, can he obtain anything except by the sweat of his brow ? Has not the chase its fatigues, fishing its dangers, and war its uncertainties ? And if man seems to love this adventurous life ; if he has an instinct warm for this kind of perils ; if the savage enjoys with delight an idleness so dearly bought ; must we then conclude that he is happier than our cultivators ? No. Their labor is more uniform, but their reward is more sure ; the woman's lot is far more agreeable ; childhood and old age have more resources ; the species multiplies in a proportion a thousand times greater,— and that alone suffices to show on which side is the superiority of happiness. Thus the laws, in creating riches, are the benefactors of those who remain in the poverty of nature. All participate more or less in the pleasures, the advantages, and the resources of civilized society. The industry and the labor of the poor place them among the candidates of fortune. And have they not the pleasure of acquisition ? Does not hope mix with their labors ? Is the security which the law gives of no importance to them ? It is astonishing that a writer so judicious as Beccaria has interposed, in a work dictated by the soundest philosophy, a doubt subversive of social order. 'The right of property,' he says, 'is a terrible right, which perhaps is not necessary.' Tyrannical and sanguinary laws have been founded upon that right ; it has been frightfully abused ; but the right itself presents only ideas of

pleasure, abundance, and security. It is that right which has vanquished the natural aversion to labor; which has given to man the empire of the earth; which has brought to an end the migratory life of nations; which has produced the love of country, and a regard for posterity. Men universally desire to enjoy speedily, to enjoy without labor. It is that desire which is terrible; since it arms all who have not against all who have. The law which restrains that desire is the noblest triumph of humanity over itself.”<sup>1</sup>

In effect, then, Bentham makes the following points: First, that, though it is true that the law renders it possible for a wealthy class to exist side by side with a propertyless class, the latter class does not owe its poverty to the law. Without the law all would be poor. Thus, while those who by talent or good fortune have become wealthy owe ultimately their riches to the law, this is not at the expense of the poor, who at least have no less than they would have had in a state of nature. Secondly, that not only is property law not prejudicial to the interests of the propertyless man, but it is positively beneficial to him, in that it offers to him at least an opportunity for gaining wealth in all its forms.

It will, perhaps, be worth while to follow out more fully this idea. There can be no doubt but that the existence of legal property has been enormously influential in stimulating men’s productive activities, and that around property rights have centred many of the elements that have been most influential

<sup>1</sup> *Principles of the Civil Code*, Chapter IX.

in promoting morality, good government, and civilization. Nor can it be questioned that, in the advance of society to higher economic and ethical planes, the propertyless man, the ordinary wage laborer, has, in general, had his condition improved. It is a question, to be sure, whether, in this development, he has shared to an equal degree with the well-to-do. Some have held that, relatively, the rich have derived the greater benefit. However this may be, the evidence is conclusive that the laboring man has profited absolutely. If, then, this be so, the conclusion follows that in so far as legal property rights have been influential in promoting economic progress or general civilization, and in so far as the laboring man has profited absolutely by such progress, to that extent he must have gained by the fact that property has existed as a legal institution.

It is to be observed, now, that the argument, as thus far carried on, establishes only the point that, to the propertied and propertyless man alike, it is an advantage that property rights should be recognized and protected. There has not been established any fact as to the extent to which *private* property rights should exist. Nor has there been established anything to show that the propertyless man has secured in the past all the advantages which legitimately should have been his. It has not been demonstrated that, in return for the protection which the law gives, the property owning classes have done, or been compelled to do, all that they should have done for the promotion of the welfare of the social whole.

It is worthy of remark, however, that in most of the civilized countries of to-day efforts are being made to obtain from property owners services commensurate with the special advantages they enjoy. Not only are deliberate and far-reaching legislative attempts being made to place upon the wealthy classes increasing social and fiscal obligations, but strenuous endeavors are being put forth to assist in every possible way propertyless men in their attempts to gain a share in the world's wealth. The imposition of heavy poor rates and progressive income and inheritance taxes, the enactment of a host of laws for the protection of labor, the establishment of all sorts of public and charitable institutions, the provision of manual training schools, etc., illustrate this. In some cases the measures adopted have been of so radical a character as to amount to practical spoliations of the rich. Professor Foxwell, indeed, after referring to the paragraph which we have quoted above from Adam Smith, adds in a note: "This view of government explains the position of the anarchists, so far as anarchism is intelligible at all. But it is clearly inappropriate to modern conditions. It might as truly be said of some democratic governments of to-day that they are a machinery by which those who have less property may compensate themselves at the expense of those who have more. The tables have been turned."

This we think, however, is an extreme statement. Even in those countries where legislation has been of the most radical character, the laws adopted have

been, after all, but individual measures, and have left undisturbed the great body of property law, the specific object of which is the maintenance of private property rights in the strictest and most technical manner.

There is no one who would maintain that in any civilized society *all* property should be owned and controlled by private individuals. Even the most extreme individualists or anarchists recognize the necessity of having certain articles of value owned in common, such, for instance, as the land upon which the streets of a city are laid out. On the other hand, there are none who assert that *all* forms of wealth should be publicly owned. It is recognized by all that at least certain articles of consumption should belong to the individuals who are to use or consume them. The communists carry the idea of public property to its extreme, but even they recognize this. The socialists of course recognize in many ways the rightfulness, as well as the economic expediency, of private property. The essential demand of the socialist goes, in fact, no farther than to ask that all "instruments for production" be commonly owned and operated. All other forms of wealth they admit should be privately owned.

If, then, it is not a question whether all property should be public or all private, the problem narrows itself to the determination of what property shall be public and what private. In this inquiry the two considerations of fundamental importance are

productive efficiency and distributive justice. There is no essential reason why these two considerations should ever antagonize one another. Other things being equal, that form of ownership which leads to the greatest economic productivity is most desirable, because, aside from more material reasons, the greater the wealth of a community, the greater is the opportunity offered for those forms of individual culture through which alone the higher planes of ethical development are attainable. Also, when we remember that the individual should seek his own good in the good of the whole, and, therefore, that he can demand as his just due only that which will enable him to realize his own good as thus interpreted, it becomes plain that the demands of distributive justice can seldom conflict with those of economic expediency. Were society perfectly organized and administered, a conflict would never arise.

In determining whether a given article should be public or private property, it would seem logical that the decision should rest upon the particular considerations involved, that is to say, upon the peculiar nature of the article in question, the uses to which it may be put, etc. Where it is decided that private ownership may exist, the conditions should be made: first, that private owners shall not be permitted to put their property to uses clearly detrimental to the public welfare, or to the legal rights of others; and, secondly, that the law, in fixing upon the facts which are to be taken as evidencing the existence of a property right, shall, so far as pos-

sible, select facts which create in the owners a moral right to protection. Do modern systems of jurisprudence, so far as they relate to the creation and definition of private property rights, conform to these two conditions?

As regards the rights of usage and enjoyment, the law fully recognizes that no property rights are of such an absolute character as to permit the individual to put his property to a use that will directly interfere with the rights of others, or work detriment to the social welfare. As Holland says: "The right of ownership is . . . unlimited only in comparison with other rights over objects. In accordance with the maxim '*sic utere tuo ut alienum non laedas*,' it must always be enjoyed in such a way as not to interfere with the rights of others, and is therefore defined in the French code as '*le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.*'"<sup>1</sup>

If, then, as we see, the law recognizes no right in the owner to put his property to a use that will interfere with the rights of others, or be detrimental to the interests of the community as a whole, it is clear that, as an abstract conception, the legal conception of private property rights cannot be objected to. All that the social reformer can ask as to this is, therefore, that the definition and manner of exercise of property rights shall be so stated as to avoid such evils as can be demonstrated to result from property

<sup>1</sup> *Elements of Jurisprudence*, Chapter XI.

rights as now defined. They cannot properly claim that property rights should no longer be maintained.

We turn now to the question whether, from the standpoint of justice, our law bases its recognition of property rights upon a proper selection of facts. This inquiry embraces two points: first, as to the conditions that are accepted by the law as creating the right of property; and, secondly, as to the purpose sought by the law in extending its protection over the right, when recognized.

We find it frequently stated that the law in its creation of property rights recognizes the validity of the occupation theory. This theory we have already shown to be invalid. It therefore becomes important to determine whether our law, or indeed any modern law, stands committed to it.

In a general way the law does recognize a property right in him who first takes possession of a *res nullius*. The rights which, in the eyes of the law, belong to the first possessor are, however, no other in nature than those which attach to the actual holder of a piece of property belonging to another. Not only in the Roman, but in the Common Law, he who has actual possession of an article of value has a legal right to hold and enjoy it as against all the world, except him who is able, by a judicial proceeding, to establish a better title to it. And this is so even though no claim of actual ownership be set up by the possessor. As against the true owner, he has, of course, no right; but even in such case the owner can enter into possession only after a judicial deter-

mination of his right. The difference between the rights of ownership and those of possession, then, consist only in this, that the owner's right to possession is good as against every one; the possessor's right is good as against every one but the owner. Thus it is that if an owner be able to establish his right to the possession of a given piece of property, he is as fully secured against the interference of others as he would be were he to establish his right to absolute proprietorship. "One who is out of possession," says Pollock, "and has a rightful claim to possess, has need of the law's assistance. When he has recovered possession, he has not any need to ask the law to do any more for him. . . . Hence it is commonly sufficient for an owner to rely on his rights to possession; and, as it is commonly easier to prove the less right than the greater, . . . it is often preferable to claim possession only. Nay more, it is possible for ownership to be sufficiently guarded for all practical purposes by a system of remedies which omits, or has come to omit, any such solemn and express form of asserting ownership as that to which the Romans emphatically gave the name Vindication. In the Common Law this has actually happened. For some centuries all practical remedies for the recovery of both land and goods have been possessory, and property has meant for judicial purposes, the right, or the best right to possess."<sup>1</sup>

Returning now to the assertion that the right recognized in the first occupant or possessor of a *res*

<sup>1</sup> *First Book of Jurisprudence*, p. 170.

*nullius* is no other in essence than that recognized in the actual holder of a piece of property owned by some one else, we see that, while it is only a right to possession that is recognized, it, in fact, becomes the equivalent of ownership, in that, *ex hypothesi*, there is no owner in existence to set up a better title.

But why is possession protected by the law, when the possessor is not also the owner? Kant and Hegel would say, because freedom of the will is to be protected at all hazards, and that by taking possession of a thing a man has brought it within the sphere of his will. This will, when so manifested, they hold, may legitimately be interfered with by no other particular will, but only by the universal will as voiced and executed by the organs of the State.<sup>1</sup> "This right following from the fact of possession," says Kant, "does not consist in the fact that because the possessor has the presumption of being a rightful man, it is unnecessary for him to bring forward proof that he possesses a thing rightfully. . . . It is because it accords with the postulate of the practical reason that every one is invested with the faculty of having as his own any external object upon which he has exerted his will, and, consequently, all actual possession is a state whose rightfulness is established upon that postulate by an anterior act of will."<sup>2</sup>

Others have said that possession should be protected because there is a presumption that the pos-

<sup>1</sup> Cf. Holmes, *The Common Law*, Lecture VI.

<sup>2</sup> *Philosophy of Law*, translated by Hastie, p. 79.

sessor is also the owner.<sup>1</sup> But this is in accordance neither with legal theory nor with legal history. The real and sole reason is, as its historical connection with the *frith* shows, that the public peace may be preserved.<sup>2</sup> Should forcible ouster of an occupant or possessor be permitted either to a stranger or to the owner, no imagination is required to picture the disorder in which the community would be continually involved. The law must, if it would secure peace at all, guarantee to the occupiers of land, and the possessors of personal property, protection against all interference, except such as is founded upon a judicial process in which it has been determined that another has a higher right to the possession of the goods in question.

In all this the sole idea is, as said, the preservation of the peace. The law accepts the distribution of wealth as it is brought about by chance, by competition, or by other economic or social forces, and seeks to render secure to each one the possession and enjoyment of the portions, if any, of the economic goods which he has obtained. Thus by preventing disorder and by punishing spoliations, the law seeks both to open to all the opportunity for gaining property, and to furnish that stimulus to industry which is derived from a knowledge that a quiet possession and undisturbed enjoyment in the fruits of one's labor are guaranteed.

When it is once decided that certain rights of

<sup>1</sup> *E.g.* Ihering, *Ueber den Grund des Besitzesschutzes*.

<sup>2</sup> See Jenks, *Law and Politics in the Middle Ages*.

ownership shall exist, either because they are just or because they are economically desirable, the law steps in and declares that the State, by its power, will guarantee such rights against violation. In so doing the law adds no new element either to the justification for private property or to the proof of its economic expediency. It is implicitly recognized that these two facts have already been established when the law comes upon the scene. Least of all does the law attempt the task of providing that each shall gain that proportion of wealth to which, upon abstract principles of justice, he is entitled.

This characteristic of the law has been especially commented upon by Menger. "If we look at the economic life by which men are surrounded," he says, "we find its main purport to be that men labor for the satisfaction of their wants, that all labor aims at a return, every want at a satisfaction. Labor and the produce of labor, wants and satisfactions, are the facts in the two sequences in which the economic life of mankind fulfils itself. The ideal law of property from the economic point of view would therefore be attained in a system which secured to every laborer the whole produce of his labor, and to every want as complete satisfaction as the means at disposal would allow. Our actual law of property, which rests almost entirely on traditional political conditions, does not even attempt the attainment of these economic ends. . . . By assigning the existing objects of wealth, and especially the instruments of production, to individuals to use at their pleasure, our law

of property invests such individuals with an ascendancy by virtue of which, without any labor of their own, they draw an unearned income which they can apply to the satisfaction of their wants. . . . Neither does our actual law of property . . . set itself the task of providing for every want a satisfaction proportionate to the available means. Our codes of private law do not contain a single clause which assigns to the individual even such goods and services as are indispensable to the maintenance of his existence. So far as our private law is concerned, the situation is somewhat brutally but very rightly expressed by Malthus in a passage which by its very frankness has attained a certain fame. 'A man who is born into a world already possessed, if he cannot get a subsistence from his parents on whom he has a just demand, and if the society does not want his labor, has no claim or right to the smallest portion of food, and, in fact, has no business to be where he is. At Nature's mighty feast there is no vacant cover for him. She tells him to be gone, and will quickly execute her own orders.' What Malthus says here of food applies to the satisfaction of all other wants."<sup>1</sup>

We are, then, confronted with this fact, that in our present property law no attempt is made to secure a just distribution of wealth. There cannot,

<sup>1</sup> *Right to the Whole Produce of Labor*, p. 3. The quotation from Malthus is from his *Essay on the Principle of Population*, 2d edition (1803), p. 531

however, be any question that, if it were possible to obtain distributive justice by legal means, the effort should be made. The socialists claim that this can be done, or at least that a distribution of wealth more just than that which competition now secures can be obtained. Every socialistic scheme necessarily has two sides—the productive and the distributive. Upon the productive side, the claim is that the nationalization of instruments of production will increase their economic efficiency. Whether this be true, or if true, whether the administrative difficulties involved can be successfully met, we must leave to the economists and publicists to answer. Upon the distributive side, the socialist's claim is that, if all products become the property of the State, it will be possible to apportion to the workers the respective shares to which they are entitled. It is with this claim that we are here especially concerned.

In order to make their claim good, it is necessary for the socialists to fix upon a principle of desert that is both more just than that which is now realized in the economic world, and one that is possible of at least an approximate enforcement by the State. Our next task is, then, to determine whether the various principles of distributive justice that have been put forward by socialistic schools fulfil these conditions.

## CHAPTER V

### CANONS OF DISTRIBUTIVE JUSTICE — THE LABOR THEORY

IN this and following chapters we propose to examine the validity of the various canons of distributive justice which have been put forward from time to time by socialistic writers as of absolute validity. The first and most important of these is that which declares that economic goods should be distributed wholly to those who have produced them by their labor.

Suggestions and chance statements of the labor theory can be found in various writings from the earliest times, but the idea is first found fully set forth and argued by Locke in his *Two Treatises of Government*.

The part played by the economic element in Locke's political scheme is a very prominent one. In fact, he conceives the need for some protection for their property to have been the chief motive which has urged men to form political unions. Individual liberty is itself treated by him as a form of property, namely, that right of ownership which a man properly has over himself. Thus Locke is able to say, "The great and chief end therefore of men uniting into commonwealths, and putting themselves

under government, is the preservation of their property.”<sup>1</sup>

The right of ownership which one has over himself Locke, of course, derives directly from natural law. Property in objective things, however, Locke founds wholly upon labor. “God,” he says, “who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being. And though all the fruits it naturally produces, and beasts it feeds, belong to men in common, as they are produced by the spontaneous hand of nature, and nobody has originally a private dominion exclusive of the rest of mankind, in any of them, as they are thus in their natural state, yet being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial, to any particular men. The fruit or venison which nourishes the wild Indian who knows no enclosure, and is still a tenant in common, must be his, and so his—*i.e.* a part of him—that another can no longer have any right to it before it can do him any good for the support of his life.”

“Though the earth and all inferior creatures be common to all men, yet every man has a ‘property’ in his own ‘person.’ This nobody has any right to but himself. The ‘labor’ of his body and the ‘work’

<sup>1</sup> *Op. cit.*, Book II, Chapter IX, § 124.

of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labor with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by his labor something annexed to it that excludes the common right of other men. For this 'labor' being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.”<sup>1</sup>

The qualification expressed in the last clause is to be especially noted, inasmuch as it would seem at once to deprive his theory of all value, except as applied to a people in a primitive state of civilization, and inhabiting a comparatively thinly settled territory. This limitation of the right of acquisition by labor by the rights of others, he renders still more definite in the following. “It will, perhaps, be objected to this,” he says, “that if gathering the acorns of the fruits of the earth, etc., makes a right to them, then any one may engross as much as he will. To which I answer, Not so. The same law of nature that does by this means give us property, does also bound that property too. . . . As much as any one can make use of to any advantage of life before it spoils, so much he may by his labor fix a property in. Whatever is beyond this is more than

<sup>1</sup> *Op. cit.*, Book II, Chapter V, §§ 26, 27.

his share, and belongs to others. Nothing was made by God for men to spoil or destroy.”<sup>1</sup>

The same principles are also applied by Locke to the acquisition of property in land. He says: “But the chief matter of property being now, not the fruits of the earth and the beasts that subsist on it, but the earth itself, as that which takes in and carries all the rest; I think it is plain that property in that, too, is acquired as the former. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. . . . Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was enough and as good left, and more than the yet unprovided could use.”<sup>2</sup>

It would seem from these quotations that Locke is himself aware that his theory gives only an explanation of how property may justly arise in a community where the gifts of nature are so abundant that the appropriation of some of them by particular individuals will not limit the corresponding rights of others. How, then, does he justify the acquisition of property in more civilized times, when the above conditions no longer prevail? He does this by saying that, by agreeing to the use of money, men have consented to the introduction of an element which renders it both possible and an object for men to obtain for themselves accumulations of wealth far greater than what they otherwise would be entitled

<sup>1</sup> *Op. cit.*, Book II, Chapter V, § 31.

<sup>2</sup> *Idem*, Book II, Chapter V, §§ 32, 33.

to acquire. Before the introduction of money, says Locke, men had no object in storing up considerable amounts of the produce, for if they did so, much of it would spoil before they could use it. But since the introduction of this token of wealth, they are enabled to exchange that which they do not want for their own use for money, and in this form preserve and continually add to it.<sup>1</sup>

Locke then goes on to show, in an excellent economic argument, the extent to which human labor enters into the production of even those things which, at first sight, appear to be most largely the spontaneous products of nature. "If we will rightly estimate things as they come to our use," he says, "and cast up the several expenses about them,—what in them is purely owing to nature and what to labor,—we shall find that in most of them ninety-nine-hundredths are wholly to be put on the account of labor."<sup>2</sup>

<sup>1</sup> "This," he says, "is certain, that in the beginning, before the desire of having more than men needed had altered the intrinsic value of things, which depends only on their usefulness to the life of man, or had agreed that a little piece of yellow metal, which would keep without wasting or decay, should be worth a great piece of flesh or a whole heap of corn, though men had a right to appropriate by their labor, each one to himself, as much of the things of nature as he could use, yet this could not be much, nor to the prejudice of others, where the same plenty was still left, to those who would use the same industry." *Op. cit.*, Book II, Chapter V, § 37.

<sup>2</sup> "It is labor, then, which puts the greatest part of value upon land, without which it would scarcely be worth anything; it is to that we owe the greatest part of all its useful products, for all that the straw, bran, bread, of that acre of wheat is more worth than the products of an acre of as good land which lies waste, is all the effect of labor. For it is not barely the ploughman's pains, the reaper's and thresher's toil, and

The conclusion drawn from this by Locke is, that so small is the relative part played by land in production, there would never have come the time when the amount of unappropriated ground would be so limited that the taking into possession of particular pieces of it by individuals would appreciably diminish the opportunity of others to do likewise, had the use of money not been introduced. "This I dare affirm," he says, "that the same rule of property, viz. that every man should have as much as he could make use of, would still hold in the world, without straitening anybody, since there is enough land in the world to suffice double the number of inhabitants, had not the invention of money, and the tacit agreement of men to put a value on it, introduced (by consent) larger possessions and a right to them."<sup>1</sup>

To sum up, then, Locke founds the right of property, not, as did Grotius and his school, upon the

the baker's sweat, is to be counted in the bread we eat; the labor of those who broke the oxen, who digged and wrought the iron and stones, who felled and framed the timber employed about the plough, mill, oven, or any other utensils, which are a vast number, requisite to this corn, from its sowing to its being made bread, must all be charged on the account of labor, and received as an effect of that; nature and the earth furnished only the almost worthless materials as in themselves. It would be a strange catalogue of things that industry provided and made use of about every loaf of bread before it came to our use, if we could trace them; iron, wood, leather, bark, timber, stone, bricks, coals, lime, cloth, dyeing-drugs, pitch, tar, masts, ropes, and all the material used in the ships that brought any of the commodities made use of by any of the workmen, to any part of the work, all which it would be impossible, at least too long, to reckon up." *Op. cit.*, Book II, Chapter V, § 43.

<sup>1</sup> *Idem*, Book II, Chapter V, § 36.

mere fact of first occupancy, but upon the labor implied in the taking of possession or in the production of the object owned. This principle he holds applicable to modern as well as to primitive times, and avoids the objection that since comparatively early times the stock of unappropriated natural wealth has not been sufficient to enable all freely to obtain an opportunity for employing their labor, by alleging that by the introduction of money men have tacitly agreed to this condition of affairs.

That the use of money, whatever its influence, can be conceived to rest upon a tacit agreement of such a character as morally to bind propertyless men to an acquiescence in their poverty, is of course so extraordinary as to need no refutation. The real reason why, in a developed society, little or no natural wealth is left unappropriated is because, with the advance of civilization, the wants of mankind have enormously increased, and, for the satisfaction of these wants it is necessary to utilize all the advantages and materials spontaneously offered by nature. In this economic development, a standard of value and medium of exchange, such as metallic money affords, has been an important factor. Money has been one of the instruments by the aid of which industrial advance has been facilitated, but it has been by no means the controlling cause. When the matter is analyzed, it is found that it has been the general advance in civilized life, and not money, that has rendered impossible a continuance of that primitive condition in which the unappropriated bounties

of nature are so abundant that the taking of possession by one individual of a portion of them does not appreciably limit the enjoyment of a similar privilege by all others.

The doctrines of the Physiocrats, so far as they relate to the rightful basis of property, were similar to Locke's. Labor was accepted as the sole efficient agent. Underneath both their economic and their political theories lay the general doctrine of "natural rights." Society was conceived as founded upon a contract, government was looked upon as a necessary evil, and all men were declared possessed of a number of original, inalienable rights which could never rightly be abridged. Among these rights were included the right to labor and the right to its proceeds. Arguing from the right to labor, the Physiocrats demanded that, so far as possible, industry should be left free from all governmental restraints. Arguing from the right to the proceeds of labor, they asked that property rights should be held sacred, and that the producer should not be exploited by excessive taxes and forced labor. The doctrines of the Physiocrats in respect to private property in land we shall discuss in another place.

Adam Smith is often quoted, and with ample justification, as holding the labor doctrine. In one place he says, "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolate."<sup>1</sup> Again, he says, "As soon as the land of any

<sup>1</sup> *Wealth of Nations*, Book I, Chapter X.

country has all become private property, the landlords, like all other men, love to reap where they have never sowed, and demand a rent even for its natural produce.”<sup>1</sup> And elsewhere: “The produce of labor constitutes the natural recompense or wages of labor. In that original state of things which precedes both the appropriation of land and the accumulation of stock, the whole produce of labor belongs to the laborer. He has neither landlord nor master to share with him. Had this state continued, the wages of laborers would have augmented with all those improvements of its productive powers, to which the division of labor gives occasion.”<sup>2</sup> It is to be noted, however, that Smith is concerned rather with the origin of wealth than with the foundation of property, that is, with wealth as appropriated. Thus Smith’s remarks, as quoted above, are incidental merely, and not made in the course of an inquiry into the justification of property. He nowhere attempts to maintain that an actual effort should be made to secure by law a distribution of wealth upon the basis of labor performed, and, in fact, so far as we are aware, he nowhere in his work attempts a careful treatment of the ethical basis of private ownership.<sup>3</sup>

Though Locke and the Physiocrats accepted and developed the theory that through labor alone is it

<sup>1</sup> *Wealth of Nations*, Book I, Chapter VI.

<sup>2</sup> *Idem*, Book I, Chapter VIII.

<sup>3</sup> See Böhm-Bawerk, *Capital and Interest*, Book VI, where it is pointed out that Smith in other places takes positions that are contradictory to the labor theory.

possible for the individual to obtain a just title to ownership of economic goods, they made no attempt to show that the legally protected rights in private property, even as to land or other instruments of production, which then existed were in violation of this principle. This honor, if honor it be, was reserved for later English writers, and it was from them that the German socialists Marx and Rodbertus borrowed, without acknowledgment, their theories. This plagiarism is abundantly shown by Menger. As Professor Foxwell says, Menger "conclusively proves that all the fundamental ideas of modern revolutionary socialism, and especially the Marxian socialism, can be definitely traced to English sources. It was a handful of English writers, brought up in the classic country of capitalistic production, and reflecting upon the terrible wreckage of the early pre-regulation period, who laid down the lines of thought upon which socialistic criticism has ever since proceeded. . . . Of this English school, the chief names are undoubtedly those of Godwin, Hall, Thompson, Gray, Hodgkin, and Bray."<sup>1</sup>

Godwin fairly deserves to rank as the founder of the modern philosophy of socialism, and moreover,

<sup>1</sup> Menger, *op. cit.*, xxvii. The principal works of these writers, and the dates of their publication, are as follows: William Godwin, *Political Justice*, 1793; Charles Hall, *The Effects of Civilization on the People in European States*, 1805; William Thompson, *An Inquiry into the Principles of the Distribution of Wealth most conducive to Human Happiness*, 1824; J. Gray, *A Lecture on Human Happiness*, 1825; Thomas Hodgkin, *Labor defended against the Claims of Capital*, 1825; J. F. Bray, *Labor's Wrongs and Labor's Remedy, or the Age of Might and the Age of Right*, 1839.

paradoxical as it may seem, of anarchism as well. For, though he first stated the ethical tenets of the socialist, he believed it possible to form a social order in which the realization of these principles could be secured without the use of coercion. As regards the labor theory of property, however, with which we are now specially concerned, his system cannot be said to play a part; for Godwin advocated the principle that the distribution of goods should be to those most in need of them, rather than to those who have produced them by their labor.

To Charles Hall belongs the honor of being the first to advocate a distribution of wealth strictly according to the labor theory. The practical measures which he recommended for the approximate attainment of this end were: (1) the abolishment of rights of primogeniture; (2) the imposition of heavy taxes upon all luxuries; (3) State ownership of land, and the allotment of tracts to families proportionate in size to the number of members contained in them.

With the work of Thompson, *An Inquiry into the Principles of the Distribution of Wealth most conducive to Human Happiness*, published in 1824, we find socialistic doctrines fairly launched in their modern form. The central point argued is that, by the payment of interest and rent to capitalists and landowners, the right of the laborer to the whole produce of his labor is violated.

In order to understand this last doctrine, and to see why it was now for the first time advanced, it

will be necessary to stop for a moment to consider the changes in industrial life which the few preceding years had brought about, and also to explain the influence which Ricardo's restatement of the labor theory, together with his "Iron Law" of wages, had upon the development of socialistic thought. Before the factory system arose, when manufacturing was largely carried on by hand at home or in small workshops, the part played by capital in production was comparatively small. Under these conditions the ethical demand that the laborer should be rewarded according to the product of his industry seemed to be, in the main, satisfactorily realized. The most apparent violations of this right were in the form of arbitrary and excessive taxes, or vexatious restrictions placed by the law upon the individual's right to engage in whatsoever occupation he chose, or, when chosen, to carry it on in whatsoever manner he should see fit. So long as the fiscal demands of governments were not excessive, nor the interference with the freedom of labor extreme, the citizen could see that in the sacrifices made, and the limitations submitted to, he received a substantial equivalent. But when these levies became exorbitant, or the restrictions too severe, this was no longer the case, and the laborer seemed, in such instances, to be deprived of a portion of the goods to which his individual industry and ability seemed fairly to entitle him. Hence we find the first practical movements for reform taking the direction of a demand for the abolition of oppressive

taxes, and the removal of the restrictions under which the laborers were obliged to carry on their trades. This, for example, was the character of the reforms demanded by the Physiocratic school, which, as we have seen, accepted unreservedly the labor theory of property.

Before this time, and, indeed, dating from the ancient days, there had been a general condemnation of the exaction of interest, or, as it was called, usury, for the use of loaned money. This reprobation of interest was based, however, not upon a reasoned theory that its payment was a violation of the right of the laborer to the whole produce of his labor, but upon a wholly absurd idea as to the part played by money in the economy of a people. After the spread of Christianity, the depreciation of interest was founded upon various declarations of the Scriptures.<sup>1</sup> To the ordinary mediæval mind these declarations were, in theory if not in practice, sufficient to place the matter beyond all doubt. The schoolmen, however, in their attempts to demonstrate the rationality of all scripturally revealed commands of God, essayed the statement of the reasons why the demand for the payment of interest is unjust. But in their explanations they got no farther than the assertions that money is by nature barren (an argument first put forward by Aristotle), that it cannot be "consumed," and that the payment of interest is, in

<sup>1</sup> Leviticus xxv. 36, 37; Deuteronomy xxiii. 19, 26; Psalms xv. 5; Ezekiel xviii. 8, 17; St. Luke vi. 35.

reality, a payment for time, which is a commodity free to all. This last argument was the one especially relied upon by Aquinas. Not until the sixteenth century was the rightfulness of interest-taking defended upon rational grounds. Calvin was the first theologian, and Dumoulin (Carolus Molinæus) the first jurist to take this position and ably argue it. Grotius took a middle position, justifying interest by natural law, but declaring it forbidden by the revealed law. Salmasius in a number of works, published between 1638 and 1640, justified the taking of interest, as did Filmer in his *Mæstio Quodlibetica* (1653), and Locke in his *Some Considerations of Consequences of lowering the Interest and raising the Value of Money* (1691). Through these works, and others less important, the doctrine of the wrongfulness of interest had been quite effectually undermined when, in 1789, Bentham wrote his famous *Defence of Usury*. In France of this time, however, the doctrine still found defenders in the Physiocrat Mirabeau (in his *Philosophie Rurale*) and the jurist Pothier. The arguments of Pothier were effectively answered by Turgot in his *Mémoire sur le prêt d'argent*. "We may look on Turgot's controversy with Pothier," says Böhm-Bawerk, "as the closing act of the three hundred years' war which jurisprudence and political economy had waged against the canon doctrine of interest. After Turgot the doctrine disappeared from the sphere of political economy. Within the sphere of theology it dragged out a kind of life for some twenty years longer, till finally, in our

century, this also ended. When the Roman Penitentiary pronounced the taking of interest to be allowable, even without any peculiar title, the Church itself had confirmed the defeat of its erstwhile doctrine."<sup>1</sup>

With the introduction of steam as a motive force, conditions of manufacture and of industrial life, outside of agricultural pursuits, fishing, and the like, were revolutionized. Production in large factories took the place of production by hand in the home or small workshop. Division of labor was carried to an extent hitherto unthought of, and enormous investments of capital were required. This change meant, not only that it became henceforth impossible for the laborer to distinguish in the completed product the actual results of his own handiwork, but that, before the product could be distributed in the form of wages, large parts of it had to be subtracted in the shape of insurance, interest on capital invested, salaries for overseers and superintendents, taxes, operating expenses (other than wages), repairs and deterioration of plant, and, finally, profits to the entrepreneur. All this of course meant the apparent return to the ordinary laborer of but a small portion of the product created by his industry, and the result was that, to those who did not fully comprehend the conditions

<sup>1</sup> *Capital and Interest*, p. 57. For a fuller history of theories of usury see this work and also the following: Lecky, *History of Rationalism in Europe*, Vol. II; White, *Warfare of Science and Theology*, Vol. II; Franck, *Philosophie du droit pénal*, p. 122 *et seq.*; *Yale Review*, February, 1894, article by H. C. Lea entitled "The Ecclesiastical Treatment of Usury," and Ashley, *English Economic History*, Vol. I.

and demands of production as thus carried on, the laborer seemed to be exploited of much of the return to which, under the labor theory, he was justly entitled.

Most modern socialistic doctrines start from this ground. Thus we may quote as typical the argument of Rodbertus, the socialist who, more than any other, devoted himself to the task of elaborating the theoretical bases of the system he held. "As there can be no income unless it is produced by labor," says Rodbertus, "rent rests on two indispensable conditions. First, there can be no rent if labor does not produce more than the amount which is just necessary to the laborers to secure the continuance of their labor, for it is impossible that without such a surplus any one, without himself laboring, can equally receive an income. Secondly, there could be no rent if arrangements did not exist which deprive the laborers of this surplus, either wholly or in part, and give it to others who do not themselves labor, for in the nature of things the laborers are always the first to come into possession of their product. That labor yields such a surplus, rests on economic grounds that increase the productivity of labor. That this surplus is entirely, or in part, withdrawn from the laborers and given to others rests on grounds of positive law; and, as law has always united itself with force, it only effects this withdrawal by continual compulsion.

"The form which this compulsion usually took was slavery, the origin of which is contemporaneous with that of agriculture and landed property. The laborers

who produced such a surplus in their labor product were slaves, and the master to whom the laborers belonged, and to whom consequently the product also belonged, gave the slaves only so much as was necessary for the continuance of their labor, and kept the remainder or surplus to himself. If all the land, and at the same time all the capital of a country, have passed into private property, then landed property and property in capital exert a similar compulsion even over freedmen or free laborers. For, first, the result will be the same as in slavery, that the product will not belong to the laborers, but to the masters of land and capital; secondly, the laborers who possess nothing, in face of the masters possessing land and capital, will be glad to receive a part only of the product of their own labor with which to support themselves in life; that is to say, again, to enable them to continue their labor. Thus, although the contract of laborer and employer has taken the place of slavery, the contract is only formally and not actually free, and hunger makes a good substitute for the whip. What was formally called food is now called wage.”<sup>1</sup>

Thus, affirming that under modern capitalistic conditions an exploitation of the laboring classes is everywhere and continually taking place, the socialists, as a rule, demand that society be so organized that the working-man shall be guaranteed the entire product of his industry.

<sup>1</sup> *Zur Beleuchtung der Sozialen Frage*, p. 33. Quoted by Böhm-Bawerk in his *Capital and Interest*, English translation, p. 331.

From an historical point of view, the starting-point of the exploitation view was that part of the system of Ricardo wherein is found a restatement of Smith's labor-value theory. Neither Smith nor Ricardo had drawn the practical conclusions which the acceptance of such a theory necessarily involved. But, with the declaration once made, and accepted, that labor is the source of all value, "it was," as Böhm-Bawerk says, "inevitable that, sooner or later, people would begin to ask why the worker should not receive the whole value of which his labor was the cause. And whenever that question was put it was impossible that any other answer could be given on this reading of the theory of value, than that one class of society, the dronelike capitalists, appropriates to itself a part of the value of the product which the other class, the workers, alone produces. . . . Thus Adam Smith and Ricardo may be regarded as the involuntary godfathers of the exploitation theory. They are, indeed, treated as such by its followers. They, and almost they alone, are mentioned by even the most pronounced socialists with that respect which is paid to the discoverers of the 'true' law of value, and the only reproach made them is that they did not logically follow out their own principles."<sup>1</sup>

Ricardo was also responsible in another way for the development of modern socialism. This was due to the so-called "Iron Law of Wages" which he formulated, and which immediately obtained a wide acceptance. This law, stated in 1817 in his *Prin-*

<sup>1</sup> *Capital and Interest*, p. 316.

ciples of *Political Economy and Taxation*, was to the effect that, under the joint influences of the economic law of diminishing returns and the Malthusian law of population, wages necessarily tend to remain at the minimum amount that will enable laborers, according to their lowest standards of comfort, to live and continue their species.

The immediate deduction, as seen in the writings of Thompson and the modern socialists, was that, if this be the inevitable tendency in a society organized on the individualistic capitalistic basis, there must be something radically wrong in that basis. Starting, then, with the assumption that labor furnishes the sole right to property, they believed that this wrong consisted in the exploitation of the laborers by payments of enormous sums to capitalists and land-owners.

The right to the whole produce of labor played no part in the French social philosophy of the eighteenth century; for, though such writers as Mestier, Morelly, and Mably vigorously attacked private property, they did so because of the vices—pride and selfishness especially—to which they believed it gave rise. Nor did the theory have a place in the theories of Babœuf, St. Simon, or Fourier.<sup>1</sup> In the writings of Proudhon, however, we find the labor theory fully set forth. But Proudhon does not found upon labor so

<sup>1</sup> See Menger, *op. cit.*, p. 62-73. Some of the followers of St. Simon did, however, accept the labor theory. See Böhm-Bawerk, *Capital and Interest*, p. 318 *et seq.*, for a statement of the views of Sismondi, who, in his *Nouveaux Principes d'Economie Politique*, accepted the labor theory of value, but drew from it no socialistic doctrines.

much a right of absolute ownership as a right to an undisturbed possession, so long as such possession does not interfere with the equal rights of others. Property, or legal ownership, whether by the individual or society, he declares to be theft. Private property, he says, renders capitalism possible, and, by the payments which the capitalist demands, labor is robbed. Private property is therefore robbery. "The primary cause of commercial and industrial stagnation is interest on capital, that interest which the ancients with one accord branded with the name of usury wherever it was paid for the use of money, but which they did not dare to condemn in the forms of house-rent, farm-rent, or profit, as if the nature of the thing could ever warrant a charge for the lending; that is robbery."<sup>1</sup>

But the evils of private property, he declares, are not to be corrected by rendering all property public. "Communism is inequality, but not as property is. Property is the exploitation of the weak by the strong. Communism is the exploitation of the strong by the weak. In property, inequality of conditions is the result of force, under whatever name it is disguised; physical and mental force; force of events, chance, fortunes; forces of accumulated property, etc. In communism, inequality springs from placing mediocrity on a level with excellence. This damaging equation is repellent to the conscience, and causes merit to complain; for, although it may be the duty of the strong to aid the weak, they pre-

<sup>1</sup> *What is Property?* translated by Tucker, p. 193.

fer to do it out of generosity — they never will endure a comparison. Give them equal opportunities of labor and equal wages, but never allow their jealousy to be weakened by mutual suspicion of unfaithfulness in the performance of the common task. Communism is oppression and slavery. Man is ever willing to obey the law of duty, to serve his country, and oblige his friends ; but he wishes to labor when he pleases, where he pleases, and as much as he pleases. He wishes to dispose of his own time, to be governed only by necessity, to choose his own friendships, his recreation, and his discipline, to act from judgment, not by command. . . .

“ Thus communism violates the sovereignty of the conscience and equality: the first, by restricting spontaneity of mind and of heart, and freedom of thought and action ; the second, by placing labor and laziness, skill and stupidity, and even vice and virtue on an equality in point of comfort. For the rest, if property is impossible on account of the desire to accumulate, communism would soon become so through the desire to shirk.”<sup>1</sup> “ If property is a natural, absolute, imprescriptible, and unalienable right, why,” he asks, “ in all ages, has there been so much speculation as to its origin ? . . . The origin of a natural right. Good God ! whoever inquired into the origin of the rights of liberty, security, or equality ? They exist by the same right that we exist ; they are born with us, live and die with us. With property it is very different indeed. By law, property can exist without

<sup>1</sup> *Op. cit.*, p. 261.

a proprietor, like a quality without a subject. It exists for the human being who as yet is not, and for the octogenarian who is no more. And yet, in spite of these wonderful prerogatives which savor of the eternal and the infinite, they have never found the origin of property." "Occupation," he says, "will not support a title to ownership;" for, "Not only does occupation lead to equality, it prevents property. For since every man, from the fact of his existence, has the right of occupation, and in order to live must have material for cultivation on which he must labor; and since, on the other hand, the number of occupants varies continually with the births and deaths,—it follows that the quantity of material which each laborer may claim varies with the number of occupants; consequently, that occupation is always subordinate to population. Finally, that, inasmuch as possession, in right, can never remain fixed, it is impossible, in fact, that it can ever become property."

"Every occupant is, then, necessarily a possessor or usufructuary, a function which excludes proprietorship. Now this is the right of the usufructuary; he is responsible for the thing intrusted to him; he must use it in conformity with general utility, with a view to its preservation and development; he has no power to transform it, to diminish it, or to change its nature; he cannot so divide the usufruct that another shall perform the labor while he receives the product. In a word, the usufructuary is, under the supervision of society, submitted to the condition of labor and the law of equality. Thus is annihilated

the Roman definition of property—the right of use and abuse—an immortality born of violence, the most monstrous pretension that the civil laws ever sanctioned. Man receives his usufruct from the hands of society, which alone is a permanent possessor. The individual passes away, society is deathless.”<sup>1</sup> In fact, Proudhon holds that the theory of occupation, if rigidly applied, would render impossible the possession by any one of definite, permanent property rights. He says: “All have an equal right of occupancy. The amount occupied being measured, not by will, but by the movable conditions of space and number, property cannot exist.”<sup>2</sup>

Labor will not support a valid right to absolute ownership, except as to consumable goods, for it involves the right of occupancy. Labor can furnish, therefore, only a qualified right to possession. This Proudhon brings out when speaking of land. “I maintain,” he says, “that the possessor is paid for his trouble and industry in his doubled crop, but that he acquires no right to the land. ‘Let the laborer have the fruits of his labor.’ Very good; but I do not understand that property in products carries with it property in raw material. . . . If he has made improvements in the soil, he has the possessor’s right of preference. Never, under any circumstances, can

<sup>1</sup> *Op. cit.*, p. 82. Proudhon’s mistranslation of the Roman formula, *jus utendi et abutendi*, is here apparent. As we have already seen, the law of private property explicitly denies the right of the owner to use his property in any way that will interfere with the legal rights of others, or endanger the safety or morality of society.

<sup>2</sup> *Op. cit.*, p. 83.

he be allowed to claim a property title to the soil which he cultivates, on the ground of his skill as a cultivator."

Among the German socialists, Rodbertus stands conspicuous not only as having developed with fulness and lucidity what Böhm-Bawerk terms the "exploitation theory" of rent and interest, but as having attempted more earnestly than his fellow-thinkers the constructive socialistic task of determining the practical means by which the laborer's right to the whole produce of his industry may be guaranteed to him, and at the same time the general welfare of society secured. Rodbertus was not an extreme socialist in that he did not, at least for the present, advocate the abolition of private property either in land or capital. The two great evils of our present economic life, he says, are pauperism, and commercial and financial crises, and these, in turn, are largely the result of the exploitation of the laborer which is constantly going on. Therefore, he believes, if the laborer can be secured a reward more nearly proportionate to his work, not only will poverty be practically abolished, but, by rendering the purchasing power of the people more nearly commensurate with the amount of the economic goods produced, gluts in the market will be prevented, and the crises which they cause made impossible. The practical plan which Rodbertus puts forward as adequate to bring all this about is that normal work-labor and time-labor days shall be declared by the State for each form of industry, and for each estab-

lishment within such industries, and that the laborer shall be paid for his work in paper money based upon such standard. Concerning the practical difficulties involved in the determination and application of such a standard we shall speak presently.

Of even greater general influence among the socialists than Rodbertus, has been Karl Marx; and his chief work, *Das Kapital*, published in 1867, has often been spoken of as the Bible of the social democrats. "And it deserves the name," says Professor Ely. "It defends their doctrines with acuteness of understanding and profundity of learning, and certainly ranks among the ablest politico-economic treatises ever written."<sup>1</sup> Nevertheless, inasmuch as Marx's theories are founded almost wholly upon those of Rodbertus and Ricardo, it will not be necessary to review them at length. It will be sufficient to say that he reaffirms the exploitation of labor under present conditions. This, he says, is due to the fact that the working-man, being deprived of "all things necessary for the realizing of his 'labor power,'" is obliged to offer that labor power upon the market for sale, and to take for it that minimum of reward which competition with his fellow-workmen brings about.

**Criticism of the Labor Theory.** — The criticism of the labor theory may, as in the case of any theory of distributive justice, take two forms. First, we may examine its validity as an abstract canon of desert; secondly, we may consider whether, even if accepted

<sup>1</sup> *French and German Socialism*, p. 137.

as ethically valid, it is one that can by any possibility be approximately realized in industrial society. We shall first inquire as to its abstract justice.

In examining the labor theory as an absolute canon of distributive desert, it is to be remembered that we are attempting to discover, not whether labor is one of a number of elements to be considered, but whether it is, as is alleged, the sole principle in accordance with which all forms of wealth should be distributed. When approached from this standpoint, the theory is found fatally defective in a number of ways.

In the first place, it can be shown that its fundamental premise, that labor is the source of all wealth, is false. This of itself, of course, deprives of all validity the canon that labor should be the sole standard of distributive desert.

It is of course true that the socialists are not so foolish as to deny the assistance which the laborer derives from capital and land. Their contention is, however, that private individuals should not be permitted by the law to exact a charge for this assistance. The question is thus reduced to one regarding the rightfulness of interest and rent.<sup>1</sup>

<sup>1</sup> "Socialists do not recognize three productive factors, land, capital, and labor; they acknowledge only a single productive power, Labor. Only human labor, they say, is creative, it alone can really produce. Of course, to be effective, it requires land and capital, but these hold a subordinate position to labor, and act merely as auxiliary means of production. But in the existing order of things, landowners and capitalists—as having exclusive possession of the material auxiliary means of production—are placed in a position to force the laborer to give up to them a great part of the product of labor, as it is only

Now this exact question has recently been subjected to a most careful examination by a number of writers who constitute what is called the "Austrian School" of economists.<sup>1</sup> So thoroughly have they done this work, that nothing more need be said upon the subject. As Smart says of Böhm-Bawerk's criticism, "The crushing confutation of the labor-value theory is work that will not require to be done twice;" and as Böhm-Bawerk himself, and with just right, says, "In future any one who thinks he can maintain this law will first of all be obliged to supply what his predecessors have omitted—a proof that can be taken seriously. Not quotations from authorities, not protesting and dogmatizing phrases, but a proof that earnestly and conscientiously goes into the essence of the matter."<sup>2</sup> Considering, then, the finality of this work, we would almost need an excuse for giving it in other than the exact language of its authors. Limitation of space, however, makes this impossible. Fortunately, however, in the introductions which he has furnished to the

on this condition that they will lend their property and allow labor to use it. . . . When the owners refuse to grant to labor the use of these auxiliaries, they place obstacles in the way of labor, as Rodbertus says; when they do grant this use, they do nothing more than merely remove the obstruction they have themselves created; they simply withdraw their own fiat. It is always the laborer who must produce. Land and capital are only conditions, not causes of production. All return is exclusively labor return."—WIESER, *Natural Value*, English translation by Malloch, pp. 78-79.

<sup>1</sup> See especially Böhm-Bawerk, *Capital and Interest*, translated by Smart, and *Positive Theory of Capital*, translated by Smart, and Wieser, *Natural Value*, translated by Malloch.

<sup>2</sup> *Op. cit.*, p. 389.

English translations of the works of Böhm-Bawerk and Wieser, Professor Smart has set forth within a comparatively few pages and with absolute clearness the nature of the inquiries attempted, the general character of the arguments used, and the essential conclusions reached. In the main, therefore, we shall follow Professor Smart's language.

The problem is thus stated: "The essential features here, as regards our problem, are that over a year's time the products manufactured are sold at a price which not only covers the value of raw materials, reimburses the various wages of manual and intellectual labor, and replaces the fixed capital as worn out, but leaves over that amount of value which is divided out among the capitalist shareholders as interest. In normal capitalistic production, that is to say, not only is the value of capital consumed in the production process replaced, but a surplus of value appears. It has not always been perceived by economists that this surplus value is the essential phenomenon of what we call interest,—that interest on capital consists of this very surplus value and nothing else,—but, wherever it is perceived, the question almost suggests itself, What does this surplus value represent? Is it merely a surplus, or is it of the nature of a wage? In other words, Is it something obtained either by chance or force, and corresponding to no service rendered by anybody or anything; or is it something connected with capital or the capitalist

that, economically speaking, deserves a return or a wage?"<sup>1</sup>

"If we appeal to the common consciousness to say what it is that capital does, or forbears to do, that it should receive interest, we shall probably get two answers. One will be that the owner of capital contributes a valuable element to production; the other that he abstains from using his wealth in his own immediate consumption." The acceptance of the first of these views leads to a group of theories called by Böhm-Bawerk "Productivity Theories." The acceptance of the second leads to what he calls "Abstinence Theories." But neither of these views is correct. The productivity theory is invalid for the following reasons: The usual treatment of the interest problem by those who profess the productivity theory "is to coördinate capital with the other factors of production, land and labor, and assume that interest is the payment for the services of capital, as wage is for the services of labor. . . . If, however, we demand an answer to what we have formulated as the true problem of interest, we shall make the discovery that the productivity theory has not even put the problem before itself. The amount of truth in the theory is that capital is a most powerful factor in the production of wealth, and that capital, accordingly, is highly valued. But to say that capital is 'productive' does not explain interest, for capital would still be productive although it produced no interest; *e.g.* if it increased the supply of

<sup>1</sup> Introduction to Böhm-Bawerk's *Capital and Interest*, p. viii.

commodities the value of which fell in inverse ratio, or if its products were, both as regards quantity and value, greater than the products of unassisted labor. The theory, that is to say, explains why the manufacturer has to pay a high price for raw materials, for the factory buildings, and for machinery—the concrete forms of capital generally. But it does not explain why he is able to sell the manufactured commodity, which is simply these materials and machines transformed by labor into products, at a higher price than the capital expended. It may explain why a machine doing the work of two laborers is valued at £100, but it does not explain why capital of the value of £100 now, should rise to the value of £105 twelve months hence; in other words, why capital employed in production regularly increases to a value greater than itself. . . . The important circumstance forgotten in this theory is that the productiveness of concrete capital is already discounted in its price. . . . To ascribe interest to the productive power of capital is to make a double charge for natural forces—in the price and in the interest. . . . It cannot be too often reiterated that the theory which explains interest must explain surplus value—not a surplus of products which may obtain value and may not; not a surplus of value over the amount of value produced by labor unassisted by capital; but a surplus of value in the product of capital over the value of the capital consumed in producing it."

“Value cannot come from production. Neither

capital nor labor can produce it. What labor does is to produce a quantity of commodities, and what capital, coöperating with labor, usually does is to increase that quantity. These commodities, under certain known conditions, will usually possess value, though this value is little proportioned to their amount; indeed, it is often in inverse ratio. But the value does not arise in the production, nor is it proportional to the efforts and sacrifices of that production. The causal relation runs exactly the opposite way. To put it in terms of Menger's law, the means of production do not account for nor measure the value of products; on the contrary, the value of products determines and measures the value of means of production. Value only arises in the relation between human wants and human satisfactions, and if men do not 'value' commodities when made, all the labor and capital expended in the making cannot confer on them the value of the smallest coin. But if neither capital nor labor can create value, how can it be maintained that capital employed in production not only reproduces its own value, but produces a value greater than itself?"<sup>1</sup>

The abstinence theory is also invalid for the following reasons: "The strength of the abstinence theory is that the facts it rests on really give the explanation how capital comes to be in primitive conditions and in new conditions. The first efforts to accumulate capital must be attended by sacrifice, a temporary sacrifice, of course, to secure a perma-

<sup>1</sup> *Capital and Interest*, Introduction, p. xi.

net gain, but, in the first instance at least, a material sacrifice. . . . But to account for the origin of capital by abstinence from consumptive use is one thing; to account for interest is another. In all production labor sacrifices life and capital sacrifices immediate enjoyment. It seems natural to say that one part of the product pays wage and another pays interest as compensation for the respective sacrifices. But labor is not paid because it makes a sacrifice, but because it makes products which obtain value from human wants; and capital does not deserve to be paid because it makes sacrifices,—which is a matter of no concern to any one but the capitalist,—but because of some useful effect produced by its coöperation. Thus we come back to the old question, What sacrifice does capital render that the abstinence which preserves and accumulates it should get a perpetual payment? And if, as we saw, productivity cannot account for interest, no more can abstinence.”<sup>1</sup>

The true reason why interest is justifiable, and one that effectually answers the exploitation theory, is the following: “When we lend capital, whether it be to the nation or to individuals, the interest we get is the difference in popular estimation and valuation between a present and a future good. If we lend to direct production, the reason we get interest is not that our capital is reproducing itself and more. The explanation of this reproduction is to be found in the work of those who employ the capital, both manual and intellectual workers. We get interest simply

<sup>1</sup> *Op. cit.*, p. xv.

because we prefer a remote to a present result. It is not that by waiting we get more than we give; what we get at the year's end is no more than the equivalent value of what we lent a year before. Capital plus interest on the 31st of December is the full equivalent of capital alone on 1st of January preceding. Interest, then, is in some sense what Aquinas called it — a price asked for time. Not that any one can get the monopoly of time, and not that time itself has any magic power of producing value; but the preference by the capitalist of a future good to a present one enables the worker to realize his labor in undertakings that save labor and increase wealth. But as capital takes no active rôle in production, but is simply material on which and tools by which labor works, manual and intellectual; the reward for waiting falls to the worker, manual and intellectual; the reward for working falls to the capitalist only. Economically speaking, as wage is a fair bargain with labor, because labor can produce its own wage, so is interest a fair bargain with the capitalist, because in waiting the capitalist merely puts into figures the universal estimate made by men between past and future goods, and the capitalist is as blameless of robbery as the laborer.”<sup>1</sup>

<sup>1</sup> *Op. cit.*, p. xix. As a criticism to the above, however, we instinctively ask why it is that we prefer a present to a future possession of a given amount of capital. To this the natural answer is, that it is because we are able to put that capital to some use. And thus one is inclined to say that, after all, it is the “use” of capital which explains its interest-producing quality. The answer to this has been satisfactorily given by Menger, but in an argument too long to be reproduced here. It is sufficient to say, however, that he shows that the “value” of goods comes from their power, when consumed, to satisfy

To the foregoing argument it may be added, that not only does capital play a part in the productive process that justly entitles it to a return, but that society itself enters as a factor equally efficient, if not as direct; and therefore that, even upon the labor theory, before laborers can claim their return, it is just that there should be subtracted from the whole product not only the legitimate return to capital, but that part which has been created, or at least rendered possible of creation, by the existence of a social order. Without social organization, without the coöperation which it makes possible, without the protection which the law affords, without all those elements of civilized life which social life and political order render possible, not only would labor be far less productive than it now is, but the laborer himself would be without a stimulus for his industry beyond that afforded by the bare need for food and clothing. Professor Ritchie, in commenting upon Locke's description of the various forms of labor that directly or indirectly are involved in the making of such a simple thing as a loaf of bread, calls attention to the fact that Locke has failed to mention this important social factor. "The soldiers that guard the country from invasion so that harvests can be reaped," says Ritchie; "the magistrates who are a terror to evil-doers; all those who increase the knowledge, quicken the intellect, and raise the char-

human wants, and that when capital is employed in production it is in fact consumed rather than simply used. Capital has therefore a greater present than future value because it has a greater consumptive value.

acter of a community, and so make complicated industrial relations more possible between human beings,—all these might claim a part in the making even of a loaf of bread. That is to say, the loaf is not merely the product of nature plus labor, but of nature plus social labor, and this social labor is not merely the aggregate of the labor of various individuals, but it is the labor of individuals working in an organized society. It is not, therefore, the individuals, as individuals, that have mixed their labor with nature, but the individuals as members of a society. Therefore, if we translate the facts into Locke's phraseology, we must say that by the law of nature, *i.e.* according to reason, apart from any explicit or tacit consent of the individuals composing the community, the loaf belongs to the society as a whole, and not to this or that individual. . . . We cannot, therefore, treat 'property' as a category independent of society, except by a false abstraction."<sup>1</sup> It is, however, to be observed that, in a socialistic state, this last-mentioned consideration would not be of great importance, as, in theory at least, under such a régime all would have the opportunity of sharing equally in the productivity of the social factor.

Finally, it is to be observed, criticism may be made of that original premise from which those who have held the labor theory have derived the natural right of the individual to the produce of his own labor; namely, his right to himself. How, asks

<sup>1</sup> *Darwin and Hegel*, chapter on "Locke's Theory of Property."

Huxley, does a man come to a right to himself? He did not create himself by his own efforts. Rather, he owes his existence and what he is to his mother who bore him, and bore with him, supported him during infancy, and educated him. "The man's physical and mental tendencies and capacities, dependent to a very large extent on heredity, are certainly the gratuitous offering of nature; if they belong to anybody, therefore, they must belong to the whole of mankind, who must be, so to speak, a kind of collective slaveowner, all of each. So much of the man as depends on the care taken of him in infancy and childhood is the property of his mother, or of those who took her place. Another smaller portion belongs to the people who educated him. What remains is his own."<sup>1</sup>

The argument that has gone before has been absolutely destructive of the premise that, by the payment of interest for the use of capital, the laborer is, *pro tanto*, exploited. With the destruction of this premise necessarily falls to the ground the conclusion that the entire produce of industry should be divided among those actively engaged in its production.

There is, however, still a possible ground for maintaining that, even though the laborers be not entitled to the whole produce, they are entitled to a share strictly proportionate to the part played by labor in production. Can this contention be maintained? We do not think it can. For the most part there

<sup>1</sup> "Natural and Political Rights," *Collected Essays*, Vol. I.

can be no doubt that economic expediency, as well as justice, demands that reward should be proportioned to work done, but this cannot be erected into an absolute principle; and for the following reasons:—

In the first place, the acceptance of such a theory necessarily means that, in such an allotment of shares, individual capacities for enjoyment, as well as the intensity of individual needs, shall be wholly disregarded. If, then, either of these factors be at all relevant in the apportionment of goods, the labor theory is fundamentally defective. That they are relevant we shall see in the next chapter.

In the second place, it is obvious that what an individual is able to produce by his labor largely depends upon naturally given or inherited capacities of mind and body. But the labor theory, if rigorously applied, makes no distinction between that efficiency which comes from naturally given powers, and that which is due to industry and faithfulness, or to capacities that have been slowly acquired by long and patient effort and serious self-denial in the past. In a former chapter, where we discussed the true relation between charity and justice, we came to the conclusion that there is upon us individually, and upon society as a whole, the moral obligation to assist to a higher level of development and happiness those who, through no fault of their own, are handicapped in the race of life by physical or intellectual defects, or find themselves plunged into an unfavorable and demor-

alizing environment, from which, unassisted, they are unable to extricate themselves. The labor theory is therefore defective in that, as a principle of justice, it does not include such an obligation. Mill exposes this defect when he says, "The proportioning of remuneration to work done is really just only in so far as the more or less of the work is a matter of choice; when it depends on natural differences of strength or capacity, this principle of remuneration is in itself an injustice; it is giving to those who have—assigning to those who are already most favored by nature."<sup>1</sup>

Finally, it is to be observed that a rigid application of the labor theory involves the denial that the young, the aged, the sick, or the incapacitated from whatever source, have a right to support. They do not work, therefore, according to the labor theory, they cannot claim, except as a matter of charity, the means absolutely necessary for subsistence. It is true that socialists generally, while accepting the labor theory, maintain also that every one who does the best he can to support himself, but fails, should be guaranteed at least a sufficiency for existence. They do so illogically, however.

The objections which we have just stated demonstrate conclusively that the labor theory of reward cannot be accepted as an absolute principle of desert. But, as we shall now show, even were it accepted as an ethically valid rule, there would be insurmountable difficulties in the way of its application.

<sup>1</sup> *Political Economy*, Book II, Chapter I, § 4.

The acceptance of the labor theory necessarily involves a socialistic organization of society. In order to labor it is necessary for the laborer to own, or at least to be in possession of, the raw materials and the instruments of production. As we have already seen, the simple fact of priority of occupation, or taking into possession, is not ethically adequate to support a right to continued possession or ownership. This means, then, that society or the State must establish and enforce some positive principle or principles in accordance with which the implements of industry shall be open to the use of all upon equal terms. But this is possible only where the State itself owns and operates them. First of all, then, the application of the labor theory involves all those political difficulties attendant upon the establishment and maintenance of a socialistic State. But, passing these by, let us see what economic difficulties there would be to overcome, were such an organization of society successfully established and its authority rigidly and satisfactorily maintained.

The economic problems that would have to be solved would be these:—

First, the determination of the kinds of work to be undertaken; that is, the kinds of products to be created.

Secondly, the determination of the relative amounts of the several products to be produced.

Thirdly, the just apportionment of the different kinds of employments amongst individual workers.

Fourthly, and finally, the just distribution of products amongst the workers.

Taking up these tasks in their order, we find that each of them involves, so long at least as the labor theory is adhered to, almost if not quite insuperable difficulties.

First, then, as regards the necessity of determining what commodities shall be produced. Products have a value, not simply because they are the fruits of labor, but because they are desired by individuals. Thus the State cannot guarantee to its workers rewards proportioned to labor performed, unless it has the right to see to it that the labor be employed for the creation of socially useful articles; that is, articles for which there is a demand. It cannot, for example, recognize the right to remuneration of the individual who had labored, however arduously, in transporting a pile of stones from one place to another, and then in carrying them back to their original resting-place. Nor is this all. Not only must any governing authority which has the entire control of the productive wealth of a community, and finds this right to control upon an ethical basis,—not only must such an authority see to it that only such goods are produced as have a value for the satisfaction of individual wants, but it must determine in each case whether the want which creates the demand is one that should be satisfied. No advocate of socialism maintains that provision should be made for satisfying all wants, however vicious and demoralizing their character. Moreover, the relative intensity of those wants that are recognized as proper would have to be considered. No argument is required to show that

the most necessitous needs should be the first satisfied, the less urgent next, and the least urgent last. Thus, in determining the forms of industry to be carried on, it is seen that the socialistic State would have the threefold task of ascertaining the existence of a want, of determining its propriety, and of estimating its intensity as compared with other known and approved desires.

Under present conditions the existence and intensity of a want is made clear by the free demands of individuals. The propriety of wants is passed upon by the State only in exceptional cases, where, under the exercise of its police powers, it steps in either absolutely to prohibit the carrying on of such occupations as are deemed inimical to public health or morality, or to see that proper conditions of operation are observed in those trades that are permitted. There is indeed no inherent reason why, under a socialistic régime, the same conditions should not prevail. As a matter of fact, however, were the State itself in direct control of all production, the temptation upon those in power to dictate generally what commodities should be produced would inevitably be very great. If not absolutely necessary, there would therefore be an imminent danger that that freedom of demand which now exists would be seriously curtailed. That such a curtailment would subject the individual to a most oppressive form of control need not be pointed out. It is only by satisfying his wants that man realizes his individuality. If, therefore, man cannot develop himself, in

the main at least, according to his own ideas, he is subjected to a slavery of the worst kind.

From the socialistic problem of determining the different kinds of products to be created, we turn next to the task of ascertaining the relative amounts to be produced. This task is necessary in order that the supply shall be made at least approximately equal to the demand. Under present conditions this is brought about automatically by free competition. When the demand for a given commodity, as compared with its supply, is relatively strong, prices rise. This attracts labor and capital into the field, and an increased supply is the result. Where the supply is greater than the demand, prices fall, and money and labor are drawn away to more remunerative employments. Thus, at any given time, the exchange value of commodities depends upon the market conditions of supply and demand rather than the actual cost of production.

In a socialistic régime which recognized this fact, that is, which permitted individuals to be remunerated for their work according to the value of their products as fixed by the law of supply and demand, and also allowed workers freely to pass from one form of employment to another, the difficulty of determining the respective amounts of commodities to be produced would solve itself. But in a socialistic State, such as we are now concerned with, which declares that labor is the sole creator of value, and that the laborer should be rewarded in exact proportion to the amount of labor expended, such an adjust-

ment would be impossible. That is to say, under such a régime, the laborer would be entitled to a wage dependent wholly upon the amount and character of his work, and quite irrespective of the exchange value that his products might have. There would, therefore, be no force of self-interest to attract laborers into the fields of production where additional workers might be needed to supply a demand, nor induce them to leave those fields where an excess of supply had made itself felt. It would therefore be necessary for the governing authorities to resort to compulsory assignments and reassessments of work as demands for commodities or services varied. But, when asked upon what principle or principles of justice such compulsory apportionments of labor could be based, socialistic philosophy has made no satisfactory answer.

The third problem which we have mentioned that any socialistic State would have to solve, is the proper apportionment of the different kinds of employment amongst the individual workers. In this assignment of tasks, reference must necessarily be had both to economic efficiency and to the deserts of the individuals concerned. Both economic expediency and distributive justice would seem to demand that work should be apportioned according to ability possessed ; namely, that to each individual should be assigned that form of employment to which he is best suited by natural powers and aptitudes. Now, to secure this result, the socialists claim that it will not be necessary for the State to assume the impossible task

of itself ascertaining the respective capacities of the individual workers and of distributing employments accordingly, but that the same result can be approximately obtained by varying the rates of remuneration offered for different forms of industry. That is to say, that, though labor is taken as the standard of measurement, it is not to be measured solely by the element of time. Its agreeableness or disagreeableness and its efficiency are to be taken into consideration. Thus, by offering lower wages for the less arduous forms of labor, the socialists claim that there will be checked that rush for them which man's natural indisposition for labor would occasion; while, by placing an equal value on all products of the same kind, men will be stimulated to seek that form of employment where, by reason of natural ability, they will be able to earn the most.

But this equality of valuation of the products in the same industry could not justly be made absolute. Fairness would demand that equality of valuation should prevail only where equality of conditions existed. Therefore valuation of products would have to vary even in the same industry, according to natural advantages or disadvantages, such as location, character of machinery used, climate, etc., under which production is carried on. Thus there would have to be fixed by the State a special rate of wages for each productive establishment. Furthermore, these rates, once established, would have to be changed from time to time, as the relative advantages and disadvantages of the different establish-

ments varied. Thus in a newly opened coal-mine, where coal is near the surface and easily mined, a low rate relative to other mines would have to be established. But as greater depths were reached, or as the vein became less pure, the rate would have to be raised.

The stupendousness of such a comparison and equalization of rates as is called for by the above, when applied to all the industries of a country and to each of the several factories and institutions within each of the industries, is sufficiently plain. Even were we sanguine enough to believe that such a harmonizing of labor rights were possible of performance by any governing authority, however sapient and upright, it cannot be believed that the correctness of such adjustment could be made so plain to the ordinary mind that no general discontent would be aroused. Rather, judging human nature as we know it,—a nature which Hobbes, we think, has said is so constituted that the axioms of mathematics would be disputed, were self-interests involved,—there would be an almost certainty that each special institution, and each industry generally, would believe itself discriminated against.

Finally, having fulfilled all the foregoing conditions, there would fall upon that socialistic State, which should accept the labor standard, the task of apportioning products among the workers strictly according to the amount of effective work done; or, in other words, of securing to them the full produce of their labor. This, of course, would not mean the

division among them of absolutely the entire amount produced. There would necessarily have to be subtracted enough to defray all public expenses, and to provide the needed capital and machinery. But no real objection could be made to this, for all would participate in the benefits to be derived from the expenditure of the funds so retained.

Now, in apportioning to each individual the produce of his own work, the chief difficulty under modern conditions of production would naturally be the determination of what that produce was. Where the division of labor has been carried to any extent, the coöperation of a number of workers, each performing a different kind of work and assisted by different kinds of machinery, is required. Evidently, in such cases, the determination of just the part played by each class of workers, and of each worker within each class, would be a practical impossibility. Only very rough approximations could be made. As regards simply the maintaining of the proper proportions of remuneration between the different workers, not even that justice which is realized by the present wages system could be hoped for. Under present conditions, the necessity for economic efficiency compels the employer to recognize and reward exceptional industry or capacity. But with all industries under governmental control, general scales of reward, which could not, under ordinary conditions, be departed from, would have to be established in order to prevent unjust official discriminations. Thus both individual desert and economic efficiency would have to

be, to this extent at least, sacrificed. Industry and efficiency would have recognition, but they would have it as judged by the performances of groups of workers, and not, except in special cases, as estimated by the achievements of individuals. Thus, if a worker were but one in a thousand, he would receive but one-thousandth of the increased product due to any special industry or capacity that he might display.

The hopelessness of being able, under modern forms of production, to discover the actual contribution of the individual worker to the completed product has necessarily been recognized by socialists. They have therefore been forced to erect an abstract standard by which to estimate the labor performance of each worker. In general this standard has been made to take the form of a unit representing the amount of product that a normal day's work of normal efficiency can produce in a given industry. By this unit the efficiency of all other labor is to be measured. But, in order to make this measurement fair, it is necessary, as we have pointed out a few pages back, that employments should be graded according to agreeableness or disagreeableness, and that each factory, mine, or other establishment of production should have a special rate.

Rodbertus, as we have said, has, perhaps, made the most serious attempt to outline a plan for realizing in practice a distribution of products according to the labor theory. It is to be observed, however, that Rodbertus greatly simplifies the problem by regard-

ing all goods as the product of manual labor. Marx and socialists generally, however, recognize that distinctions should be made, not only as between employments of varying degrees of pleasantness, but as between manual and purely intellectual labors. This is of course absolutely necessary in order to save the socialistic school from an obvious absurdity. At the same time it is a clear departure from the pure labor theory. This departure is usually disguised under the form of an assertion that an hour's work of one form of labor, such, for example, as painting or teaching, shall be taken as equal, say, to ten or twenty hours of normal manual labor. Now, were such a difference between the respective valuations of an hour's labor in each case based upon the idea that a proportionate difference in degree of effort, or inconvenience, or suffering is involved, there might be ground for maintaining that the labor theory had not been abandoned. But, where this is not the basis of the distinction, and where, in fact, the higher reward is made to go to the labor involving no more effort, and often far less inconvenience or suffering, some standard other than labor is implied. Böhm-Bawerk, in criticising Marx's position upon this point, says: "The naïveté of this theoretical juggle is almost stupefying. That a day's labor of a sculptor may be considered equal to five days' labor of a miner in many respects—for instance in money valuation—there can be no doubt. But that twelve hours' labor of a sculptor actually are sixty hours' common labor no one will maintain. . . .

Men may invent what fiction they please; there is here an exception to the rule asserted that the exchange value of goods is regulated by the amount of human labor incorporated in them. Suppose that a railway generally graduates its tariff, not according to the distances travelled by persons or goods, but, as regards one part of the line in which the working expenses are particularly heavy, arranges that one mile shall count as two, can it be maintained that the length of distances is really the exclusive principle in fixing the railway tariff? Certainly not; by a fiction it is assumed to be so, but in truth the application of that principle is limited by another consideration—the character of the distances.”<sup>1</sup>

<sup>1</sup> *Capital and Interest*, p. 384.

## CHAPTER VI

### THE LABOR THEORY AS APPLIED TO PROPERTY IN LAND

WE turn now to the bearing of the labor theory upon the justice or injustice of private ownership of land. A number of those who have accepted the labor theory have drawn the conclusion that all valuable objects not the result of human labor should be considered as free gifts of nature or of nature's Creator, and, as such, intended, not for the special advantage of any particular individuals, but for the welfare of mankind at large. It is in this category that land has been placed. Land, it has been held, is, by its very nature, *sui generis*, and, as such, private ownership of it must be justified, if justified at all, by reasons different from those applicable to other forms of property.

Locke's peculiar justification of property in land, under the labor theory, we have already mentioned. The Physiocrats justified land ownership on the ground that it is necessary in order that there may be secured the right of ownership which labor creates. In developing this reason they thus reached what was practically a doctrine of simple expediency. Thus Dupont de Nemours, in his *Origine et progrès*

*d'une science nouvelle*, writes: "In employing his person and his movable wealth on the labor and outlay necessary to cultivation, man acquires property in the soil on which he has labored. To deprive him of that soil would be to rob him of his labor and the wealth he has laid out on the cultivation; it would be to violate his property in his own person and movables. In acquiring property in the land, he acquires property in the fruits produced by it, and this was the object of all his expenditure, and the object for which he seeks to gain that property in land. Unless [and here the utilitarian argument begins] he had this property in the fruits of the soil, no one would spend wealth or labor on the land; there would be no landlords; and the soil would remain waste, to the great detriment of population, present and future."<sup>1</sup>

This argument tacitly implies that ownership of land should be recognized only where the owner is also an improver and cultivator. As a matter of fact, however, though the Physiocrats often criticised absentee landlordism, they did not declare the invalidity of their titles. The time was not ripe for such an assertion. As Bonar says: "The time had not come for economical discussions to touch the deepest foundations of property. The communism of men like Morelly was an isolated opinion. There was more need in the beginning of the second half of that century for the assertion of liberty in the sense of the removal of obstacles."

<sup>1</sup> Quoted by Bonar in his *Philosophy and Political Economy*, p. 143.

It was in England that the demand, based upon the labor theory, was first put forward that all land should be owned in common; and it is in England that at the present time this demand is most loudly voiced.

In 1796 was published the work of Thomas Spence entitled *The Meridian Sun of Liberty; or the Whole Rights of Man displayed and most accurately defined*. In this work the spoliation of the laboring classes by the landlords is denounced, and the equal right of all to the land asserted.<sup>1</sup> Other writers from time to time have repeated this view. But most conspicuous among all English writers who have substantially advocated land nationalization is John Stuart Mill.

Notwithstanding his assertion, which we have quoted some pages back, that the labor theory of distribution involves the inherent objection that, in its rewards, it makes no distinction between that efficiency that comes from natural qualifications, and that which is the result of applied effort or of slowly and patiently acquired capacity, Mill elsewhere accepts the theory as absolutely valid. In his *Political Economy* he says: "The institution of property, where limited to its essential elements, consists in the recognition in each person of a right to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement, without force or fraud, from those

<sup>1</sup> For an account of Spence's views, and his influence, see Menger, *The Right to the Whole Produce of Labor*, pp. 147-149.

who have produced it. The foundation of the whole is the right of the producers to what they themselves have produced.”<sup>1</sup> But this qualification for private ownership cannot be pleaded, he goes on to say, in the case of land, for land is not the produce of labor. Thus, by its very nature, as he conceives it, land is marked off from all manufactured goods, and, as he declares, “if the land derived its productive power wholly from nature, and not at all from industry, or if there were any means of discriminating what is derived from each source, it not only would not be necessary, but it would be the height of injustice, to let the gift of nature be engrossed by individuals.”<sup>2</sup>

As thus possessing this character as a gift of nature, and therefore intended by Natural Law for the equal benefit of all, private ownership of land is to be justified, if justified at all, Mill goes on to say, upon special grounds of economic expediency. Thus, in effect, he holds that labor gives such a natural or abstract right to ownership of manufactured goods no economic justification for it is needed; whereas property in land must ever depend upon simple utilitarian considerations. Furthermore, and what seems strangely inconsistent with Mill’s general doctrines, utilitarian considerations can never, he declares, create so sacred a right in the landlord as can labor in the owner of other forms of wealth. “When the ‘sacredness of property’ is talked about,” he says, “it should always be remembered that any such sacredness does not belong in the same degree

<sup>1</sup> Book II, Chapter II.

<sup>2</sup> *Idem, loc. cit.*

to landed property. No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of general expediency. When private property in land is not expedient, it is unjust. [Would he hold it consistent with the general doctrines of utilitarianism which he accepts, to say that this would not be true as to other forms of property?] It is no hardship to any one to be excluded from what others have produced. . . . But it is some hardship to be born into the world and to find all nature's gifts previously engrossed, and no place left for the newcomer."

The economic necessity for landlordism Mill readily grants, placing it upon the obvious grounds that "the strongest interest which the community and the human race have in the land is that it would yield the largest amount of food and other necessary or useful things required by the community. . . . In order, therefore, to give the greatest encouragement to production, it has been thought right that individuals should have an exclusive property in land, so that they may have the most possible to gain by making the land as productive as they can, and may be in no danger of being hindered from doing so by the interference of any one else. This is the reason usually assigned for allowing land to be private property, and it is the best reason that can be given."<sup>1</sup>

But if, then, this be the sole justification for pri-

<sup>1</sup> "The Right of Property in Land," *Dissertations and Discussions*, Vol. V.

vate ownership of land, it necessarily follows, says Mill, first, that the landlord should have his title recognized only so long as he is an improver or cultivator;<sup>1</sup> and, secondly, that in so far as, during his holding of it, a piece of land increases in value by reason of general social causes, and not as a result of labor by him expended or capital applied, such increase should belong to society.<sup>2</sup>

The means suggested by Mill for securing to society this increase, or "unearned increment," is that the landlords should hereafter pay a special tax "within the limits of the increase which may accrue to their present income from causes independent of themselves." "From the present date, or any subsequent time at which the legislature may think fit to assert the principle, I see no objection," he says, "to declaring that the future increment of rent should be liable to special taxation; in doing which all injus-

<sup>1</sup> "These are the reasons which form the justification, in an economical point of view, of property in land. It is seen that they are only valid, in so far as the proprietor of the land is its improver. . . . In no sound theory of private property was it ever contemplated that the proprietor of the land should be merely a sinecurist quartered on it." *Political Economy*, Book II, Chapter II.

<sup>2</sup> "Giving all the weight to this consideration which it is entitled to, the claim it gives to the landlord is not to all the possible proceeds of the land, but to such part of them only as are the results of his own improvements, or of improvements made by his predecessors in whose place he stands. Whatever portion of them is due, not to his labor or outlay, but to the labor and outlay of other people, should belong to those other people. . . . If the nation at large, by their successful exertions to increase the wealth of the country, have enhanced the value of the land independently of anything done by the landlord or the tenant, that increase of value should belong to the nation." "The Right of Property in Land," *Dissertations and Discussions*, Vol. V.

tice to landlords would be obviated if the present market price of their land were secured to them, since that includes the present value of all future expectations. With reference to such a tax, perhaps a safer criterion than either a rise of rents or a rise of the price of corn would be a general rise in the price of land. It would be easy to keep the tax within the amount which would reduce the market value of land below the original valuation; and up to that point, whatever the amount of the tax might be, no injustice would be done to the proprietors.”<sup>1</sup>

Closely resembling, but more radical than the views of Mill regarding land ownership, are those of Henry George, as elaborated in his famous work, *Progress and Poverty*. George accepts the labor theory of property unreservedly. Both natural and divine law declare, he says, the indefeasible right of an ownership founded on labor. “As to the right of ownership, we hold,” he says, “that, being created individuals, with individual wants and powers, men are individually entitled (subject of course to the moral obligations that arise from such relations as those of the family) to the use of their own powers and the enjoyment of the results. There thus arises, anterior to human law, and deriving its validity from the law of God, a right of private ownership in things produced by labor—a right that the possessor may transfer, but of which to deprive him without his will

<sup>1</sup>“The Right of Property in Land.” For the practical difficulties that such a scheme as Mill’s would involve, see Walker, *Land and its Rent*, pp. 121-141.

is theft. This right of property, originating in the right of the individual to himself, is the only full and complete right of property. It attaches to things produced by labor, but cannot attach to things created by God.”<sup>1</sup> And again, he says, “Thus there is to everything produced by human exertion a clear and indisputable title to exclusive possession and enjoyment which is perfectly consistent with justice, as it descends from the original producer, in whom it rested by natural law. . . . There can be no other rightful title, because there is no other natural right from which any other title can be derived.”<sup>2</sup>

This being so, private ownership in land, says George, is unjustifiable for two reasons: first, because it is not a product of labor; and, secondly, because free access to it by all is necessary in order that labor may find the wherewithal upon which to employ itself. “Private property in land is wrong. For the right to the produce of labor cannot be enjoyed without the right to the free use of the opportunities offered by nature, and to admit the right of property in these is to deny the right of property in the produce of labor.”<sup>3</sup>

George, of course, distinguishes between improvements made upon land and the naturally given values of the soil, and it is only to these latter that he has reference when he speaks of land as the gift of God to mankind as a whole, and, as such, not appropriable by individuals. When a man cultivates

<sup>1</sup> *Op. cit.*, Book I, Chapter I.

<sup>2</sup> *Idem*, Book VII, Chapter I.

<sup>3</sup> *Idem*, Book VII, Chapter I.

the soil, says George, he acquires a right of property in the produce which his labor brings forth, but not in the soil on which it grew ; "for these are the continuing gifts of God to all generations of men, which all may use, but none may claim as his alone."<sup>1</sup> But though labor employed upon the soil does not give a right to the soil itself, it does create a right to possession; for "as men begin to cultivate the ground and expend their labor in permanent works, private possession of the land on which labor is thus expended is needed to secure the right of property in the products of labor."<sup>2</sup>

Thus far it is seen that the reasoning of George is identical with that of Mill, except that with George the necessity of guaranteeing to the individual the products of his labor gives rise to the right of "possession," whereas with Mill it is interpreted as justifying "proprietorship." Possession and proprietorship are very different things, says George: "The purpose of the one, the exclusive possession of land, is merely to secure the other, the exclusive ownership of the products of labor; and it can never rightfully be carried so far as to impair or destroy this. While any one may hold exclusive possession of the land so far as it does not interfere with the rights of others, he can rightfully hold it no farther." The problem thus becomes, "to combine the advantages of private possession with the justice of common ownership." To do this, "it is only necessary to take for the common uses what

<sup>1</sup> Quoted from his work, *The Condition of Labor*.

<sup>2</sup> *Idem.*

value attaches to land irrespective of any exertion of labor on it.”<sup>1</sup>

The manner in which George proposes to do this is quite similar to that proposed by Mill, namely, the imposition of a tax to an amount sufficient to absorb all income that is derived from the original or socially acquired values of the soil. That is to say, he would not nationalize the land in the sense of making the State the general landlord, but would simply have society appropriate its net produce. “Consider,” he says, “what rent is. It does not arise spontaneously from the land; it is due to nothing that the landowners have done. It represents a value created by the whole community. Let the landholders have, if you please, all that the possession of the land would give them in the absence of the rest of the community. But rent, the creation of the whole community, necessarily belongs to the whole community.”<sup>2</sup>

As is well known, where George wholly parts company with Mill is in his denial to present holders of land of a right to compensation for this virtual appropriation by the State of their property. The statement of the manner in which George attempts to justify this spoliation we shall, however, postpone, until we come to the criticism of the general premises upon which Mill and George base their systems.

A considerable portion of George’s work is taken up in describing the evils consequent upon the pres-

<sup>1</sup> *Idem.*

<sup>2</sup> *Progress and Poverty*, Book VII, Chapter III.

ent landlord régime. The extreme position is taken that in an advancing civilization the inevitable tendency is for rent, not only to absorb all the increase in wealth which is the outcome of improved means of production and transportation, but to draw to itself more than this. Hence, says George, so long as individual ownership of land is permitted to continue, not only can the laboring man hope for no increase in his wages, but he must expect that his condition will become steadily worse: "Rent swallows up the whole gain, and pauperism accompanies progress." "The reason why, in spite of the increase of productive power, wages constantly tend to a minimum which will give but a bare living, is that, with increase in productive power, rent tends to even greater increase, thus producing a constant tendency to the forcing down of wages."<sup>1</sup>

<sup>1</sup> *Progress and Poverty*, Book V, Chapter II. Other statements showing the extreme position of George upon this point are the following:—

"The value of land depending wholly upon the power which its ownership gives of appropriating wealth created by labor, the increase of land values is always at the expense of the value of labor. And, hence, that the increase of productive power does not increase wages, is because it does not increase the value of land. Rent swallows up the whole gain and pauperism accompanies progress." Book III, Chapter VIII.

"The effect of increasing population upon the distribution of wealth is to increase rent, and consequently to diminish the proportion of the produce which goes to capital and labor, in two ways: First, by lowering the margin of cultivation. Second, by bringing out in land special capabilities otherwise latent, and by attaching special capabilities to particular lands." Book IV, Chapter II.

"Wealth in all its forms being the product of labor applied to land or the products of land, any increase in the power of labor, the demand for wealth being unsatisfied, will be utilized in procuring

The utter misconception both of economic facts and economic laws which underlies the argument by which George reaches this conclusion must be left to the economists to point out. To the economists must also be left the consideration of what would be the probable effects of the imposition of such a single tax as that advocated.

Alfred Russell Wallace is another prominent advocate of the expediency and justice of land nationalization.<sup>1</sup> Like George, Wallace finds in rent the cause of almost all economic evils; but, unlike George, would have the State assume direct ownership of land, and would compensate the former owner either by the payment of a lump sum, or, preferably, by an annuity to him and to "any heir or heirs of the land-owner who may be living at the passing of the act, or who may be born at any time before the decease of the said owner." "This," continues Wallace, "would insure to the owner himself, and to all persons in whom he could possibly have any present interest, the same net income from the land which they enjoyed before the passing of the act."<sup>2</sup>

Finally, conspicuous among those who have in their writings given support to the theory that land

more wealth, and thus increase the demand for land." Book IV, Chapter III.

"All that I wish to make clear is that, without any increase in population, the progress of invention constantly tends to give a larger proportion of the produce to the owners of land, and in a smaller and smaller proportion to labor and capital." Book IV, Chapter III.

<sup>1</sup> See his work entitled, *Land Nationalization: Its Necessity and its Aims*, first published in 1882.

<sup>2</sup> *Op. cit.*, 3d edition, p. 199.

may not justly be held in private ownership is Herbert Spencer. The part which Spencer has played in this controversy is not, however, an easy one to describe. The reason for this is that, though he is sufficiently explicit in his first published work that private property in land is an injustice to the landless, he has subsequently declared his abandonment of such position. At the same time, however, he has continued to affirm the premises upon which his first conclusion was founded, and has not indicated, at least in any satisfactory way, how it is that from them he is now able to reach a different result. In his book, *A Perplexed Philosopher*, Henry George has subjected the various utterances of Mr. Spencer on the land question to a merciless review. While one cannot, of course, give the slightest consideration to the charges made therein by George that the change in Spencer's views has been due to his having "tasted the sweets of London society" and become the friend of "Sir John and his Grace," one cannot escape the conviction that Spencer has, in the course which he has pursued and the explanations which he has offered, exhibited neither candor nor consistency.

Spencer's first book, *Social Statics*, was published in 1850. After deducing his well-known fundamental principle that "every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man," he there proceeds to determine the concrete rights which logically follow. In Chapter IX he examines "The Right to the Use of the Earth," and

in Chapter X, "The Right of Property." "Given," he says, "a race of beings having like claims to pursue the objects of their desires—given a world adapted to the gratification of those desires—a world into which such beings are similarly born, and it unavoidably follows that they have equal rights to this world. . . . Equity, therefore, does not permit property in land." In its origin, he goes on to say, private property in land was the outcome of violence, fraud, and force, and asks: "Could valid claims be thus constituted? Hardly. And if not, what becomes of the pretensions of all subsequent holders of estates so obtained? Does sale or bequest generate a right where it did not previously exist? Would the original claimants be non-suited at the bar of reason, because the thing stolen from them had changed hands? Certainly not. And if one act of transfer can give no title, can many? No; though nothing be multiplied forever, it will not produce one. . . .

"'But time,' say some, 'is a great legalizer. Immemorial possession must be taken to constitute a legitimate claim. That which has been held from age to age as private property, and has been bought and sold as such, must now be considered as irrevocably belonging to individuals.'" To which Spencer replies, "Whether it may be expedient to admit claims of a certain standing, is not the point. We have here nothing to do with considerations of conventional privilege or legislative convenience. We have simply to inquire what is the verdict given by

pure equity in the matter. And this verdict enjoins a protest against every existing pretension to the individual possession of the soil; and dictates the assertion, that the right of mankind at large to the earth's surface is still valid; all deeds, customs, and laws notwithstanding. Not only have present land tenures an indefensible origin, but it is impossible to discover any mode in which land can become private property."

Finally, in closing this chapter, Spencer says: "No doubt great difficulties must attend the resumption, by mankind at large, of their rights to the soil. The question of compensation to existing proprietors is a complicated one—one that perhaps cannot be settled in strictly equitable manner. Had we to deal with the parties who originally robbed the human race of its heritage, we might make short work of the matter. But, unfortunately, most of our present landowners are men who have, either mediately or immediately—either by their own acts, or by the acts of their ancestors—given for their estates equivalents of honestly earned wealth, believing that they were investing their savings in legitimate manner. To justly estimate and legitimate the claims of such is one of the most intricate problems society will one day have to solve. But with this perplexity and our extrication from it abstract morality has no concern. Men, having got themselves into the dilemma by disobedience to the law, must get out of it as well as they can, and with as little injury to the landed classes as may be."

George gains from this last quoted paragraph the idea that, by the complexity of the question of compensation spoken of by Spencer, reference is had to the difficulty of distinguishing between the natural values of lands, for which no compensation need be paid, and the improvements thereon, for which a recompense should be given. This, however, is certainly not what Spencer says, nor, as we believe, what he intended to say. To our mind, the meaning is that, should society assume possession of the land, a certain inequity would necessarily be committed, inasmuch as the present landowners have in most cases "given for their estates equivalents of honestly earned wealth, believing that they were investing their savings in a legitimate manner," but that this inequity would be less than that of permitting a continuance of private landlordism.

In his Chapter X, entitled "The Right of Property in Land," Spencer accepts the labor theory, but criticises the view of Locke so far as private ownership of the soil is justified. Granting to society an inalienable right to the soil, he finds the Lockian theory of property irreproachable. The individual may have a just right to all that he has produced, but for the use of the soil he must pay a rent to society.

Between 1850 and 1882 Spencer added nothing to his views on the land question. In this latter year, however, he published his volume on *Political Institutions*. In this work, in his chapter on "Property," he says nothing, however, that would indicate any essential change from his earlier expressed views.

But in 1883, in a letter called forth by an article in the *St. James's Gazette*, he calls attention to the fact that he wishes his views upon the question of land nationalization to be taken as tentative, and that, in fact, he had intended to express them as such in his *Political Institutions*. “The writer of the article in the *St. James's Gazette*,” he says, “does not represent the facts correctly when he says that the view concerning the ownership of land in *Social Statics* is again expounded in *Political Institutions*, ‘not so fully, but with as much confidence as ever.’ In this last work I have said that ‘though industrialism has thus far tended to individualize possession of land, while individualizing all other possession, *it may be doubted* whether the final stage is at present reached.’ Further on I have said that ‘at a stage still more advanced, *it may be* that private ownership of land will disappear,’ and that ‘*it seems possible* that primitive ownership of land by the community . . . will be revived,’ and yet again I have said that ‘*perhaps* the right of the community to the land, thus tacitly asserted, will, in time to come, be overtly asserted.’ Now it seems to me that the words I have italicized imply no great ‘confidence.’ Contrariwise, I think they show quite clearly that the opinion conveyed is a tentative one.” To which George very properly replies: “The passages Mr. Spencer quotes no more modify the view of land ownership set forth in *Social Statics* than Lord Lytton’s *Coming Race* controverts Adam Smith’s *Wealth of Nations*. In *Social Statics* Mr. Spencer declares what ought to be

done; in the passages he quotes from *Political Institutions* he is prognosticating as to what is likely will be done.”<sup>1</sup>

In 1889, in a letter to the *Times*, Spencer asserts that *Social Statics* was intended to be a system of political ethics—“absolute political ethics, or that which ought to be, as distinguished from relative political ethics, or that which is at present the nearest practical approach to it.” All that was then said, he declares, was “said in the belief that the questions raised were not likely to come to the front in our time or for many generations.” And he closes by saying that “nationalization of the land effected after compensation for the artificial value given by cultivation, amounting to the greater part of its value, would entail in the shape of interest on the required purchase money, as great a sum as is now paid in rent, and indeed a greater, considering the respective rates of interest on landed property and other property. Add to which there is no reason to think that the substituted form of administration would be better than the existing form of administration. The belief that land would be better managed by public officials than it is by private owners is a very wild belief. What the remote future may bring forth there is no saying; but with a humanity any-

<sup>1</sup> *A Perplexed Philosopher*, p. 82. For the inextricable contradictions into which Mr. Spencer is led in an attempt to declare that for a number of years he had been doing all he could to stop the circulation of his *Social Statics*, when in fact all the time the book was being published and sold in America, with his authority, see *idem*, pp. 83, 85, 108-112.

thing like that which we now know, the implied reorganization would be disastrous."

In other words, Spencer declares that the realization of what has been discovered to be absolutely just is by no means to be attempted. As a striking commentary upon such a position, George quotes Spencer's own words, where in his *Social Statics* he says: "Not as adventitious, therefore, will the wise man regard the faith that is in him—not as something which may be slighted, and made subordinate to calculations of policy, but as a supreme authority to which all his actions should bend. . . . And thus, in teaching a uniform, unquestioning obedience, does an entirely abstract philosophy become one with all true religion. Fidelity to conscience—this is the essential precept inculcated by both. No hesitation, no faltering about probable results, but an implicit submission to what is believed to be the law laid down to us. . . . We are to search out with a genuine humility the rules ordained for us—are to do unfalteringly, without speculating as to consequences, whatever these require; and we are to do this in the belief that then, when there is a perfect sincerity,—when each man is true to himself—when every one strives to realize what he thinks the highest rectitude,—then must all things prosper."

The latest views of Spencer are to be found in his *Justice*, published in 1892 as Part IV of his *Principles of Ethics*. Chapter XI of this work is entitled, "The Rights to the Uses of Natural Media." Here he repeats that "the earth's surface cannot be denied

to any one absolutely without rendering life-sustaining activities impracticable. . . . Hence it appears to be a corollary from the law of equal freedom, interpreted with strictness, that the earth's surface may not be appropriated absolutely by individuals, but may be occupied by them only in such manner as recognizes ultimate ownership by other men; that is, society at large."

In the beginning, says Spencer, communism in land actually existed. After quoting several alleged facts regarding the Russian *mir*, he declares, "Such facts, and numerous other facts, put beyond question the conclusion that before the progress of social organization changed the relations of individuals to the soil, that relation was one of joint ownership, and not of individual ownership." But conquest and force has everywhere suspended this communal proprietorship by individual ownership; but, as Spencer says, the original theory still survives in the legal idea that ultimately the title to all land is vested in the State. And, he adds, "It remains only to point out that the political changes which have slowly replaced the supreme power of the monarch by the supreme power of the people, have by implication replaced the monarch's supreme ownership of the land by the people's supreme ownership of the land."<sup>1</sup> If this be so, then,—though Spencer does not so explicitly declare,—even from the legal stand-

<sup>1</sup> We say "alleged," for as we shall see a little further on, the latest opinion of historians is that the *mir* does not and never has illustrated a true type of land communism.

point, no objection can be raised to the community's reasserting its ethical right to the actual ownership and use of the soil now engrossed by individuals.

George seems to think that Spencer means to infer by the above argument that in the recognition of the State's paramount title to land as now shown in the exercise of its police power and power of eminent domain, the right of all individuals to that free access to the use of the soil which the law of equal freedom requires is practically secured to them. Spencer's meaning is not plain, but to us it rather appears that the meaning intended to be conveyed is as we have stated it. As a matter of fact, of course, the theory of the English law of which Spencer speaks is not a survival of the primitive idea of common ownership, but an inheritance from the feudal system. And, moreover, the State does not exercise any more absolute a control over land under its right of eminent domain than it does over other forms of property under its "police powers." In truth, indeed, the interference with private property rights under the latter power is, in one respect at least, more serious than that exercised under the former; for when land has been taken from its owners by a proceeding instituted under the right of eminent domain compensation is ordinarily given; whereas, when property values are destroyed by the police power no indemnification is awarded.

In Appendix B to his *Justice*, after giving figures to show the aggregate amounts that the landless have received in the past from the landlords in the

form of poor-relief,—but not mentioning or apparently remembering the income that the landlords have in the past secured from their holdings,—Spencer says: “When in *Social Statics*, published in 1850, I drew from the law of equal freedom the corollary that the land could not equitably be alienated from the community, and argued that after compensating its existing holders it should be reappropriated by the community, I overlooked the foregoing considerations. Moreover, I did not clearly see what would be implied by the giving of compensation for all that value which the labor of ages had given to the land. While, as shown in Chapter XI, I adhere to the inference originally drawn, that the aggregate of men forming the community are the supreme owners of the land,—an inference harmonizing with legal doctrine and daily acted upon in legislation,—a fuller consideration of the matter has led me to the conclusion that individual ownership subject to State-sovereignty should be maintained.”

In effect, then, we see that, though Spencer has held varying views regarding the expediency and even the justice of resorting again to communal ownership of land, he has held consistently to the idea that land by its very nature is not intended for private ownership, and to the opinion that, as an abstract principle of right,—that is, divorced from all questions of present feasibility,—engrossment of the soil by individuals is an injustice to those who, by such engrossment, are prevented from exercising that right to the free use of the land which they are

declared to have in common with their fellows. Upon this point, Mill, George, Wallace, and Spencer agree.

**Criticism.** — In undertaking a criticism of the theories of Mill, George, Wallace, and Spencer, it would be a comparatively easy task to show that they have both exaggerated the evil effects of private landlordship, and ignored its beneficent influences. Furthermore, it would not be a serious task to point out the practical difficulties that necessarily lie in the way either of applying and collecting a "single tax," or of establishing and maintaining a general State landlordship. Criticism of this sort belongs, however, to the economic specialist, and in fact economists have abundantly demonstrated the economic fallacies involved in the system we have been discussing.<sup>1</sup> Our examination shall therefore be limited to the questions of justice involved.

The refutation of the labor theory of property which has gone before abolishes the main distinction which is usually made between the right to land and to other forms of wealth; for, even if it be admitted that land is a free gift of nature, while other goods are wholly the result of human labor which, however, as we shall see, is not admitted, still, inasmuch as it has been shown that labor cannot furnish the sole justification for private property, there is still left open the possibility that the true justification

<sup>1</sup> See especially Walker, *Land and its Rent*, and a series of valuable papers published in No. XXVII of the *Journal of the American Social Science Association*.

will be such as to warrant individual ownership of land as well as of manufactured commodities.

As a matter of fact, the distinctions which Mill, Spencer, and George make between land and other goods are not valid. In the first place, land is not unique in being strictly limited in amount. Many other articles of value are not susceptible of indefinite increase. In truth, at any one time, the amount of any commodity in existence and available for human use is definitely determined. Many goods are, indeed, of such a character that their amount may easily be added to by the energy of man, but as to all that class which come under the law of "diminishing returns," this is not so; and as to many of these last, an attempt to increase to any considerable degree their total amount would prove a more difficult task than would be the extension of available arable land to-day.

But even were this not so, the mere fact that free sale and exchange of land everywhere exists among civilized peoples is sufficient to destroy any argument based upon the alleged monopolistic character of land ownership. So long as men are free to exchange manufactured commodities for land, and there is no concerted attempt on the part of land-owners to keep their estates out of the market, there is presented to every individual practically the same opportunity for becoming a landowner as there is for his becoming a capitalist of any other sort.<sup>1</sup>

<sup>1</sup> As Edward Atkinson has somewhere said, it is now more easy for the ordinary individual to obtain land, than it formerly was among savages by occupation.

It may be replied, however, that if a given individual have no inalienable right to some piece of land, it is theoretically possible for the society of which he is a member to refuse him a place upon which to sleep or even stand. Therefore, it may be argued, if a man have a right to life at all, he must have a right to the possession, or at least to the enjoyment in common with others, of some definite piece of ground. To this it may be replied that, in the first place, no individual has an abstract, that is to say, an absolute, right to life. This we shall show in another chapter.<sup>1</sup> In the second place, it may be answered, that even were the right to life recognized, this would not place land upon a basis distinct from all other kinds of wealth. Place a naked man upon an unimproved piece of land anywhere except in the warmer latitudes, and he would soon perish, unless given, or allowed to exchange the products of his land for, articles of clothing, materials for building, implements of husbandry, etc. If, then, we are going to recognize an absolute right to life, we must, according to circumstances, group other commodities with land as not ethically susceptible of general private ownership. In truth, as Professor J. B. Clark has said, if the landless man has any case against the world, it is that he has a lack of wealth,—of accumulated value,—not that he has no land.

In distinguishing between products of the soil and other forms of economic goods, George repeats the

<sup>1</sup> *Post*, Chapter X.

error of the Physiocrats that nature coöperates only in certain forms of production, whereas the truth is that it coöperates in all. In one place George himself seems to recognize this. Thus he says: "When we speak of labor creating wealth, we speak metaphorically. Man creates nothing. The whole human race, were they to labor forever, could not create the tiniest mote that floats in a sunbeam—could not make this rolling sphere one atom heavier or one atom lighter. In producing wealth, labor, with the aid of natural forces, but works up, into the forms desired, preëxisting matter." But the conclusion that he draws from this is, not that, labor furnishing the only valid title to ownership, no man can claim right to the entire product of his labor, but that, "to produce wealth, [labor] must, therefore, have access to this matter and to these forces—that is to say, land."<sup>1</sup>

Mill, in his *Political Economy*, sees very plainly the fact that nature participates in every form of production, and from it draws a conclusion that is absolutely destructive both to the labor theory of property in general, and to the land theory of George and Spencer in particular. He says: "The part which nature has in any work of man is indefinite and incommensurable. It is impossible to decide that in any one thing nature does more than in any other. One cannot even say that labor does less. Less labor may be required, but if that which is required is absolutely indispensable, the result is

<sup>1</sup> *Progress and Poverty*, Book V, Chapter I.

just as much the product of labor, as of nature. When two conditions are equally necessary for producing the effect at all, it is unmeaning to say that so much of it is produced by one and so much by the other; it is like attempting to decide which half of a pair of scissors has most to do in the act of cutting; or which of the factors, five or six, contributes most to the production of thirty.”<sup>1</sup>

There is one result, moreover, which logically follows from George’s premises, which is not always sufficiently emphasized, and which, if emphasized, would go far toward depriving his scheme of the popularity it enjoys. This necessary result is that the exclusive appropriation of a given territory by any particular community cannot be justified. For if, as George says, “Natural justice can recognize no right in one to the possession and enjoyment of land that is not equally the right of all,” then all men, as men, and not simply as members of a particular social aggregate, are entitled to participate in the advantages which its possession yields. Huxley has put into amusing yet truthful form the effect that the assertion of this fact would probably have upon the popularity of George’s scheme. Consider, says Huxley, the effect of a sober and truthful statement of what “the orating person really meant, or, according to his own principles, ought to mean, say of such a speech as this:—

“‘ My free and equal fellow countrymen, there is not the slightest doubt that not only the Duke of

<sup>1</sup> *Op. cit.*, Book I, Chapter I, § 3.

Westminster and the Messrs. Astor, but everybody who holds land from the area of a thousand square miles to that of a tablecloth, and who, against all equity, denies that every pauper child has an equal right to it, is a robber. [Loud and long-continued cheers; the audience, especially the paupers, standing up and waving hats.] But, my friends, I am also bound to tell you that neither the pauper child, nor Messrs. Astor, nor the Duke of Westminster, have any more right to the land than the first nigger you may meet, or the Esquimaux at the north end of this great continent, or the Fuegians at the south end of it. Therefore, before you use your strength in claiming your rights, and take the land away from the usurping dukes and robbing Astors, you must recollect that you will have to go shares in the produce of the operation with the four hundred and odd millions of Chinamen, the one hundred and fifty millions who inhabit Hindoostan, the—[loud and long-continued hisses; the audience, especially the paupers, standing up and projecting handy movables at the orator].”<sup>1</sup>

Besides the criticism which has already been made of George's theories regarding land ownership, there are several minor objections which may be made, but which scarcely need be dwelt upon at any length. In the first place, if strictly applied, his system would destroy the validity, not merely of present land titles, but of almost all other forms of wealth. If no landlord has ever in the past obtained a valid

<sup>1</sup> *Methods and Results*, essay on “Natural and Political Rights.”

title to his land, then, when he has exchanged or sold his alleged property for some other form of wealth, such other forms could not rightfully have become his, but must, in equity, have continued to belong to that society which was and is the rightful owner of the soil for which it was exchanged. But, inasmuch as originally almost all wealth consisted of land, this would justify the confiscation to public uses of practically all wealth of a permanent character.

In the second place, George attempts to obtain support for his theory by alleging that, as an historical fact, "the common right to land has everywhere been primarily recognized, and private ownership has nowhere grown up save as the result of usurpation." And he continues, "The primary and persistent perceptions of mankind are that all have an equal right to land, and the opinion that private property in land is necessary to society is but an offspring of ignorance that cannot look beyond its immediate surroundings — an idea of comparatively modern growth, — as artificial and as baseless as that of the divine right of kings."<sup>1</sup>

The authorities upon which George relies as to the original community of ownership of the soil among all races, so far as known, are de Laveleye and Maine. As a matter of fact, however, later research has shown with practical conclusiveness that these writers are mistaken upon this point, or at least have not proved it.<sup>2</sup> The refutation of the idea of

<sup>1</sup> *Progress and Poverty*, Book VII, Chapter IV.

<sup>2</sup> See especially de Coulanges' essay, entitled *The Origin of Property in Land*, and Jenks, *Law and Politics in the Middle Ages*.

an original community of land ownership deprives George's theory of any support that he may have sought from it, but it does not, of course, play any essential part in a vindication of the rightfulness of private property in land; for, as George himself says, "If it were true that land had always been treated as private property, that would not prove the justice or necessity of continuing so to treat it, any more than the universal existence of slavery, which might once have been safely affirmed, would prove the justice and necessity of making property of human flesh and blood. . . ."

From our standpoint, not so important, yet quite valid, is the objection to the assertion made by George that his proposed single tax is ideally just upon the ground that it apportions itself according to benefits received. This principle has been generally repudiated by economists as a just basis of taxation. The idea is, in fact, dependent for its validity upon the individualistic political philosophy of the eighteenth century, according to which the State is viewed simply as an agent for the accomplishment of individual interests. When, however, the true conception of the nature of the State and of its ends is obtained, it is seen that "the principle of contribution becomes shifted from that of benefits to that of ability, of faculty, of capacity. Every man now must support the State to the full extent, if need be, of his ability to pay. He does not measure the benefits of the State action to himself: first, because the benefits are quantitatively immeasura-

ble; and, secondly, because, if he is a patriot, he considers not the welfare of himself, but of the community at large, and he contributes to this general welfare, not in proportion to any share of personal aggrandizement, but in accordance with the elevated ethical conception of relative ability.”<sup>1</sup>

**The Right to Compensation.** — As has already been said, George differs from Mill in that he sees no reason in equity why, if society should seek to take to itself its own, the present holders of land should be compensated. The demonstration which we have made of the invalidity of a distinction between land and other forms of wealth as to the rightfulness of private ownership necessarily carries with it the refutation of this view. For if there be no sufficient reason for distinguishing, as to ethical right of ownership, between private property in land and property in other forms of wealth, there cannot be any just ground for confiscating the property of landowners *as such*, while the owners of other forms of wealth are unmolested. At the same time, however, it is comparatively easy to show that, even were George’s theories in other respects true, they would not justify the reasoning which he has brought forward to support the claim that no compensation should be given to the landlords. The vital objection to the spoliation which George pro-

<sup>1</sup> Seligman, in *Journal of the American Social Science Association*, No. XXVII. For an admirable discussion of the question of abstract justice in the apportionment of taxes, see the articles “Taxation” and “Graduated Taxation,” by Professor Seligman, in Palgrave’s *Dictionary of Political Economy*. See also Seligman’s *Essays in Taxation*.

poses lies of course in the fact that, even if private property in land be unjust, the present owners have, in practically all cases, exchanged for their holdings values honestly acquired and owned, and have done so at a time when both law and social opinion have justified the private ownership of land, and guaranteed to it their protection. How, then, the question necessarily arises, can such owners justly be deprived of their property by that same society whose law and custom justified the original investment?

George answers this question by saying: "Why not make short work of the matter anyhow? For this robbery is not like the robbery of a horse or a sum of money that ceases with the act. It is a fresh and continuous robbery, that goes on every day and every hour. It is not from the produce of the past that rent is drawn; it is from the produce of the present. It is a toll levied upon labor constantly and continuously. Every blow of the hammer, every stroke of the pick, every thrust of the shuttle, every throb of the steam-engine, pays it tribute. It levies upon the earnings of men who, deep under ground, risk their lives, and of those who over white surges hang to reeling masts; it claims the just reward of the capitalist and the fruits of the inventor's patient effort; it takes little children from play and from school, and compels them to work before their bones are hard or their muscles are firm; it robs the shivering of warmth; the hungry, of food; the sick, of medicine; the anxious, of peace. It debases, and embrutes, and embitters.

It crowds families of eight and ten into a single squalid room; it herds like swine agricultural gangs of boys and girls; it fills the gin palace and groggery with those who have no comfort in their homes; it makes lads who might be useful men candidates for prisons and penitentiaries; it fills brothels with girls who might have known the pure joy of motherhood; it sends greed and all evil passions prowling through society as a hard winter drives the wolves to the abodes of men; it darkens faith in the human soul, and across the reflection of a just and merciful Creator draws the veil of a hard, and blind, and cruel fate! It is not merely a robbery in the past; it is a robbery in the present—a robbery that deprives of their birthright the infants that are now coming into the world. Why should we hesitate about making short work of such a system? Because I was robbed yesterday, and the day before, and the day before that, is it any reason that I should suffer myself to be robbed to-day and to-morrow? Any reason that I should conclude that the robber has acquired a vested right to rob me?"<sup>1</sup>

The earnestness and eloquence of the paragraphs that have been quoted go far toward showing the influence which Mr. George's work has had among the masses, but it is difficult to believe that it was not evident to a man of George's intellectual ability that the argument set forth was absolutely irrelevant. For if all that he says be true, if private ownership in land be a continuing robbery, and

<sup>1</sup> *Progress and Poverty*, Book VII, Chapter III.

attended by the evils he describes, nothing is proved that destroys the equities that have been created in the past. If, as he says, rent is drawn, not from the past, but the present, cause the robbery instantly to cease, but let this not be a warrant for exploiting those who have invested their honestly earned wages in landed property.

But, says George, “To buy up individual property rights would merely be to give the landholders in another form a claim of the same kind and amount that their possession of land now gives them; it would be to raise for them by taxation the same proportion of the earnings of labor and capital that they are now enabled to produce. Their unjust advantage would be preserved, and the unjust disadvantage of the non-landholders would be continued.”<sup>1</sup>

To this we reply, if this be true, then the existence of a capitalistic class, however their wealth be originally obtained, is unjust; whereas, as we have already shown, this is not so. In fact, George himself, though not upon proper grounds, defends the existence of an interest-securing class.

It will be interesting to see how he does this. “If wealth,” he says, “consisted but of the inert matter of the universe, and production of working up this inert matter into different shapes, . . . interest would be but the robbery of industry, and could not longer exist. . . . But all wealth is not of the nature of planes, or planks, or money, which has no reproduc-

<sup>1</sup> *Op. cit.*, Book VII, Chapter III.

tive power, nor is all production merely the turning into other forms of this inert matter of the universe. It is true that if I put away money, it will not increase. But suppose, instead, I put away wine. At the end of the year I will have an increased value, for the wine will have improved in quality. Or supposing that, in a country adapted to them, I set out bees; at the end of the year I will have more swarms of bees and the honey which they have made. Or supposing, where there is a range, I turn out sheep, or hogs, or cattle; at the end of the year I will, upon the average, also have an increase. Now what gives the increase in these cases is something which, though it generally requires labor to utilize it, is yet distinct and separate from labor—the active power of nature; the principle of growth, of reproduction, which everywhere characterizes all the forms of life. And it seems to me that it is this which is the cause of interest or the increase of capital over and above that due to labor. . . . Now the interchangeability of wealth necessarily involves an average between all the species of wealth of any special advantage which accrues from the possession of any particular species, for no one would keep capital in one form when it could be changed into a more advantageous form. . . . And so in any circle of exchange the power of increase which the reproductive or vital force of nature gives to some species of capital must average with all; and he who lends, or uses in exchange, money, or planes, or bricks, or clothing, is not

deprived of the power to obtain an increase, any more than if he had lent or put to a reproductive use so much capital in a form capable of increase. . . . Thus interest springs from the power of increase which the reproductive forces of nature, and in effect analogous capacity for exchange, give to capital. It is not an arbitrary, but a natural thing; it is not the result of a peculiar social organization, but of laws of the universe which underlie society. It is, therefore, just."<sup>1</sup>

As we have already seen, the true reason why interest is paid, and why it is rightfully paid, is not, as George thinks, because of the naturally fructifying characteristic of certain forms of wealth, but because of the fact that an immediate advantage is actually worth more than a deferred one.

It is not to be gathered from the foregoing that confiscation by the State of land privately owned can never be justified save when compensation is offered. If the necessity for the change should be shown to be imperative, and yet the existing conditions should be of such a character as absolutely to preclude the possibility of payment of indemnity to the landlords, confiscation would be justified in much the same way that a private house may justly be demolished in order to prevent the spread of a conflagration, or the value of any private property

<sup>1</sup> *Op. cit.*, Book III, Chapter III. As Böhm-Bawerk points out, George's theory resembles Turgot's "Fructification Theory," but differs from it in that Turgot places the source of interest outside of capital, that is, in rent-bearing land, while George seeks it outside the sphere of capital in certain naturally fruitful kinds of goods.

destroyed by the exercise of the State's "police power."

This, however, is something quite different from what is maintained by the followers of George. They justify the exploitation of the landlord upon a theory as to the peculiar character of land which distinguishes it generically from all other forms of wealth. The principle which we have just stated recognizes the original right of the owners of the land, but supersedes it by the enforcement of a higher right. The followers of George deny the original equity of private ownership of land, and thus declare that no right exists for the violation of which a justification is needed.

The justice of the appropriation by the community of only the future unearned increment of land, as advocated, for example, by Mill, depends upon principles already stated. If this appropriation should be so made that the actual market value of land would not be affected, no special justification would be needed. Whether or not the step should be taken would, under such circumstances, be simply one of economic expediency. It may be observed, however, that it is by no means certain that there is an unearned, that is a socially earned, increment which attaches to land that does not also attach to many other forms of wealth.

The whole matter is summed up, however, in saying that unless land can be shown to be of such a character that for its private ownership there must be discovered an ethical warrant different from that

which is needed for other forms of property, an interference with its value by the State, present or future, can be defended only upon the same grounds that will justify a like interference with the values of other forms of wealth.

## CHAPTER VII

### OTHER CANONS OF DISTRIBUTIVE JUSTICE

**Effort Theory.** — As we have seen, one of the chief objections to the ethical validity of the labor theory is that, in its apportionment of rewards, no distinction is made between that productive efficiency which is due to abilities patiently and laboriously acquired by the effort of the individuals concerned, and that which results from the qualities of mind and body naturally given by heredity or spontaneous variation. At first thought, a corrective to this defect seems to be given by making efforts expended, rather than actual results reached, the distributive criterion. But here, to an even greater degree than is the case with the other standards of distributive justice which we have considered, the principle is one impossible of practical application. The fatal difficulty is in determining, even approximately, the amount of effort honestly expended by an individual in the performance of a given piece of labor, or, if determined, of comparing it with the amounts expended by other individuals. As Mackenzie says: "Are we to mean by effort the amount of energy expended? or are we to mean the difficulty which a given individual experiences?

The difficulty will obviously vary with the abilities of the workers, and will be a quite incalculable element; and if, instead of considering the difficulty for a given individual, we consider rather the difficulty for an average human being, we are still not freed from the presence of a factor which defies calculation. There are some forms of labor which have no estimable degree of difficulty for an average human being, but are strictly impossible. It is not allowed *mediocribus esse poetis*, and there is a similar prohibition on the performance of all the higher forms of artistic production in the manner in which a merely average human being could perform them. The reward of such production, therefore, if estimated by the difficulty for an average human being, would be expressible only by an infinite magnitude. The same remark would apply also to some extent to the labor of superintendence in some of the more complicated industries, and to the work of the scientific investigator. Nor could we escape from this difficulty by endeavoring to estimate the amount of energy which is on the average expended in different kinds of labor, rather than the degree of difficulty which is involved. For there is no common measure for different modes of the expenditure of human energy. Moreover, even if it were possible to evade the difficulties in the way of the estimation of effort, it would be obviously unfair to reward labor in proportion to the effort which it involves, without reference to the values of the objects which are produced by it—

unless it could be assumed that all forms of labor in which human beings engage are necessary for the well-being of society. For it is easily possible to expend a great deal of effort upon objects which no sane community would ever think of encouraging ; and even on objects which are in themselves desirable it is easily possible to expend an amount of effort which is quite disproportionate to their value. It would not be wise, therefore, to proportion reward to effort, unless the direction of efforts to worthy objects were very strictly enforced ; and this would obviously involve serious difficulties. Again, it is not at once obvious what forms of activity ought to be regarded as constituting effort at all. In our ordinary conception of labor we think chiefly of muscular effort, with which it is comparatively easy to deal. Whenever we go beyond this, it becomes very hard to determine what is and what is not labor, and still harder to determine what is and what is not the product of any particular labor.”<sup>1</sup>

In the above Professor Mackenzie has effectively exhibited the practical difficulties inherent in any distributive scheme based upon effort. He might have added also, however, that under such a scheme it would be necessary, not only to estimate the amount of effort put forth by an individual in a given time or upon a given work, but to take into consideration the amount of effort that may have been previously exerted by that individual in de-

<sup>1</sup> *Introduction to Social Philosophy*, 2d ed., p. 297.

veloping his natural powers to a higher degree of efficiency.

The means of measuring effort that are at all open to estimate are the time employed in labor and the results obtained. Obviously time alone cannot measure effort, for work varies in intensity and arduousness. Yet if we attempt to measure it by the results reached, we are brought back to the labor theory, with all its practical difficulties and inequities.

Aside, however, from the impossibility of applying the canon of reward according to effort expended, the rule is ethically defective. The element of effort, in truth, must serve rather as the basis for a rule of obligation upon the agent himself than as a principle of desert to be applied by the distributing power. Every individual is under a moral obligation to employ his talents to their fullest extent for the benefit of humanity. This being so, no reward is needed or indeed demandable; for the performance of a duty cannot furnish a claim for recompense. This duty to labor carries with it also, of course, the obligation to develop to the utmost activities potentially possessed. The right which corresponds to this duty is not to proportionate reward, but to the opportunity for development and use of one's capacities. This means, not merely that there is a negative obligation upon others and upon society at large to refrain from such action as will prevent the use and development of the powers of the individual, but that, so far as means allow, each person should have the opportunity of obtaining such implements and

materials of work as are needed. To the student, for example, this would mean the provision of books, teachers, educational facilities; to the investigator, laboratories and apparatus; and to the musician, musical instruments.

Abstractly considered, the existence of the obligation upon the individual to work creates in society a right to compel its performance. Practically considered, however, the actual exercise of such a right, except in particular instances, is impossible. In the first place, it is impossible to determine the character and capacities of individuals. In the second place, even if determinable, the proper exercise of at least all the higher kinds of activities is not subject to any compulsion that society is able to apply. Furthermore, as Mackenzie points out, such compulsion cannot be advocated except by those who are willing to see present property rights seriously interfered with, if not absolutely destroyed. "For as long as men are allowed to acquire property, no inducement to labor can be brought to bear on those who have acquired it, unless some sort of penalties were to be devised; and, so far as one can at present judge, no system of penalties could be made to work." And he adds, "What is desirable is rather that those who are so favorably situated should employ their opportunities—as some actually do—for the purpose of rendering to the State or to society such services as only those who are so favorably situated can render."<sup>1</sup>

**Theory of Needs.** — We come now to the last canon

<sup>1</sup> *Op. cit.*, p. 307.

of distributive justice which speculative ethics has suggested,—that of needs. This is the theory which declares that want-satisfying goods should be given to those who have the greatest need for them, that is, to those in whose hands their consumption or utilization will be productive of the greatest benefit.

This principle of justice has found a very considerable acceptance among communists and socialists. Thus it is found expressed by Cabet in his *Voyage en Icarie*, which bears upon its title-page, “*À chacun suivant ses besoins, de chacun suivant ses forces.*” It is also accepted by Louis Blanc, as appears in his well-known motto, “*De chacun selon ses facultés, à chacun selon ses besoins.*” The writer who has most carefully developed the argument in support of this principle is, however, Godwin. Godwin’s views upon this point have already been touched upon in the treatment of the extent to which and the manner in which the idea of impartiality should enter into the conception of justice. Godwin’s argument, we will remember, was that, where discrimination is made between individuals, the sole determining factor should be the relative values to society of the individuals concerned. The logical corollary to this is, that want-satisfying goods should be distributed according to the relative intensity of the needs which the individuals concerned have for the commodities that are to be distributed.

“To whom,” asks Godwin, “does an article of property, suppose a loaf of bread, justly belong? To him who most wants it, or to whom the possession

of it will be most beneficial? Here are six men famished with hunger, and the loaf is, absolutely considered, capable of satisfying the cravings of them all. Who is it that has a reasonable claim to benefit by the qualities with which this loaf is endowed?" And he answers the question by saying, "If justice have any meaning, nothing can be more iniquitous than for one man to possess superfluities, while there is a human being in existence that is not adequately supplied with these." Furthermore, Godwin goes on to say: "Justice does not stop here. Every man is entitled, so far as the general stock will suffice, not only to the means of being, but of well-being. It is unjust if one man labor to the destruction of his health or his life that another man may abound in luxuries. It is unjust if one man be deprived of leisure to cultivate his rational powers, while another man contributes not a single effort to add to the common stock. The faculties of one man are like the faculties of another man. Justice directs that each man, unless perhaps he be employed more beneficially to the public, should contribute to the cultivation of the common harvest, of which each man consumes a share. This reciprocity, indeed, . . . is of the very essence of justice."<sup>1</sup>

<sup>1</sup> *Political Justice*, Book VIII, Chapter I. It would seem that, logically, all utilitarians should accept this principle rather than that of equality; for, as we have already shown, if pleasure be the great good, the greatest aggregate of pleasure will be the greatest good, and this will obviously be obtainable only by assigning advantages to those who have the greatest need for them, and therefore who will derive from their possession the most intense enjoyment.

It is quite obvious that to the right to receive according to needs should be joined the corresponding obligation upon individuals to render to society services according to capacities possessed. Indeed we find, as is seen in the formulas of Cabet and Blanc, that this has been generally recognized.

Considering now the abstract justice of this principle of need, when complemented by the obligation of service, it must be recognized that here at last is a doctrine to which no ethical objection can be made. Certainly there is no escape from the logic of Godwin that, other things being equal, a given commodity or service should be assigned to that individual who, among all his fellows, stands most in need of it. Nor is there any possible qualification that can be placed upon the general obligation upon each individual to render to mankind the fullest measure of benefit that lies within his power.

But in accepting these principles of desert and service, it is of course to be understood that, in the eyes of distributive justice, what a man really needs is only that which will enable him best to fulfil the moral obligations under which he rests. This being so, the individual can claim from others, or from society at large, a satisfaction of his needs only on the ground that he has the power and disposition to make their satisfaction ultimately redound to his own best good and that of humanity. And thus we are led back to the principle with which we ended our analysis of the nature of justice; namely, that a man's rights are measured by his capacity and dispo-

sition for good, and imply the obligation on his part to seek that good.

At the same time, however, that we accept this principle of needs as an ideal rule of justice, we recognize that it is one even more impossible of enforcement by law than any of the other distributive principles heretofore examined and rejected. The impossibility of enforcing the obligation of service has just been adverted to ; while, as regards the distribution of goods according to needs, the manifest difficulty is in determining man's infinite needs, their relative intensities and values. The determination of relative intensities is sufficiently difficult, for the most loudly voiced wants are not always the most urgent needs; but when estimation of the comparative ethical values of desires is attempted, the task becomes a clearly hopeless one.

This ideal of justice which we have accepted must, then, be accepted as an ideal for the individual rather than as one to be enforced by the law. While it may not furnish definite rules of conduct to the individual, it provides at least the touchstone by which he may guide his whole life. It declares to him the necessity of striving at all times to realize the best that is in him, and of aiding, whenever possible, others to do likewise. It teaches him that wealth, opportunity, and personal capacity are trusts that are to be administered in behalf of humanity. It leaves it, however, to his best judgment to determine, as each particular occasion arises, what specific duty is thus implied.

**Right to Subsistence.** — A modification of the needs theory is that which holds that society should guarantee to every individual at least the means of maintaining life. As applied to children, the aged, the sick, and to all other persons who are disqualified for work, this means the direct provision by society for their needs. As applied to the able-bodied, it means the recognition of a right to labor; that is, not simply a right to seek employment, but to find it. And this necessarily means that the State shall provide work for those who, after diligent search, have not been able to obtain it at private hands.

This alleged “right to labor” has played, and indeed still plays, a prominent part in socialistic thought, and has, moreover, exercised no unimportant influence upon actual legislation.

The influence of the doctrines of the right to subsistence and of the right to labor in actual legislation appears in the English poor law of 1601, the French Constitution of 1791 and 1793, and the Russian civil code of 5th February, 1794, all of which, as Menger says, “agree in the declaration that the State or the local authorities (commune, parish, etc.) are bound to support the poor or to provide them with work.” “But the right to labor,” as Menger hastens to add, “must be distinguished from the right to relief, even when this is given in the form of work; for the right to labor, as understood by socialists, is of the nature of a right to any other property, and is neither founded in liberality on the part of the State nor implies indigence on the part of the claimant, so

that it must assume the humiliating form of poor-relief.”<sup>1</sup>

The origin of the idea of a right to subsistence as found in socialistic thought, so far as traceable, is to be found in the writings of Fichte, with whom, as Bonar says, “the modern socialism of Germany may be said to begin.”<sup>2</sup> Thus, after declaring that the first end of man is to live, and that this involves the right to live by his own labor, Fichte proceeds to argue that it must be one of the duties of the State to see to it that this right is rendered possible of realization. And therefore he concludes: “As soon as any man cannot live by his labor, that is withheld from him which was absolutely his own, and the (social) contract is, so far as he is concerned, completely annulled. He is from that moment no longer rightfully bound to recognize any other man’s property. In order that the consequent insecurity of property may not continue, the rest must, as a matter of right and of civil contract, give him of their own, that he may live. For the moment that any man is in want, no one really owns such part of his property as is his needful contribution to save the sufferer from want.”<sup>3</sup>

Fourier, first among the avowed socialists, empha-

<sup>1</sup> *Right to the Whole Produce of Labor*, p. 14. The right to a minimum of subsistence is recognized in that very interesting coöperative experiment established by M. Godin and known as the *Société du Familistère de Guise*. For a detailed account of the organization of and results reached by this association, see *Bulletin No. 6* of the United States Department of Labor, article by W. F. Willoughby.

<sup>2</sup> *Philosophy and Political Economy*, p. 280.

<sup>3</sup> *Science of Rights*, Part II, Book III, § 1. Cf. Bonar, *op. cit.*, p. 285.

sizes the right of labor, or to subsistence in case of disqualification for work.<sup>1</sup> Fourier's ideas were repeated by Considérant in his pamphlet, *Théorie du droit de propriété et du droit au travail* (published 1839). "A model of brevity and clearness," says Menger, "Considérant's pamphlet had a great success; if we accept Louis Blanc's cry of the organization of labor, which he borrowed from the Saint Simonians and propagated in his famous work, there is hardly a question so often discussed in the socialist papers and pamphlets of the Forties as this of the right to labor. So, when, after the revolution of February, the proletariat became for the moment the determining factor, it immediately extorted from the provisional government the proclamation of February 4, 1848, recognizing the right to labor, which was afterward incorporated in the French legal code."<sup>2</sup>

The alleged attempt on the part of the French government to apply this principle in practice by the establishment of national workshops according to the principles outlined by Louis Blanc, is a matter of history. We say the "alleged attempt," for there is good reason for believing that there was no serious effort on the part of those in power to render the experiment a successful one.<sup>3</sup>

<sup>1</sup>He does not appear to have been acquainted, however, with Fichte's previous elaboration of this point. Cf. Menger, *op. cit.*, p. 17.

<sup>2</sup>*Op. cit.*, p. 20. The text of the proclamation was as follows: *Le Gouvernement provisoire de la République française s'engage à garantir l'existence de l'ouvrier par le travail; Il s'engage à garantir du travail à tous les citoyens.*"

<sup>3</sup>The management of this scheme was intrusted to one Émile Thomas, an enemy of Blanc. Thomas himself says that, when given

The most recent form which this right to subsistence has taken in actual legislation, is insurance of the working-man against accident, sickness, and old age. In its complete development, this scheme of working-men's insurance "comprehends the care and indemnification of all wage-earning men and women in case they are incapacitated for work, either temporarily or permanently, as the result of an accident or sickness, and the grant to them of a pension after they are no longer able to work on account of physical disability or old age. Under it no one need look forward with apprehension to the privations consequent upon sickness or accident. The ever constant dread of dependent old age is wiped out at a stroke. It constitutes, therefore, the latest and most radical measure to grant thorough-going relief in the chief cases of suffering to which the wage-earning classes are now exposed."<sup>1</sup>

Already this insurance movement has made great advances, both in its voluntary and compulsory forms. Bismarck, to whom more than any one else is due working-men's insurance as it now exists in Germany, founded his policy upon an unqualified adherence to the doctrine of a natural right of all individuals to demand from the state or society of

the work, he was informed by the government that it was intended that the plan should fail, and that the theories of Blanc should be thereby discredited.

<sup>1</sup> W. F. Willoughby, *Working-men's Insurance*, p. 1. See this work for an account of the extent to which this movement has already gone, not only upon the Continent, but, in the non-compulsory form, in England and the United States.

which they are members remunerative employment sufficient to sustain life so long as they are able-bodied, and subsistence when they are incapacitated. Thus in 1878 he declared; "To sum up my position, give the laborer the right to labor as long as he is in health, give him work as long as he is in health, insure him care when he is ill, and insure him a provision when he is old." And again in 1884 we find the Imperial Chancellor replying to an opponent: "I will answer the first question upon which he touched, the 'right to labor.' Yes, I recognize unconditionally a right to labor, and shall advocate it as long as I am in this place."<sup>1</sup>

**Criticism.** — An abstract right to labor or to a minimum subsistence must rest upon the same theoretical basis as the general right to receive according to needs; for, in fact, it represents but the demand for the satisfaction of the most acute of all needs, the need for the wherewithal to support life. But, as we have already seen, the meaning of this right is that only such desires shall be taken as denoting true needs as are predicated upon an ability and disposition to add something to the good of humanity. From this, then, it necessarily follows that a right to subsistence or to labor can only be maintained when it appears that the welfare of humanity will be advanced by the continued existence of the individual concerned. Now, inasmuch as we can conceive of but few cases in which the good

<sup>1</sup>Quoted by Menger, *Right to the Whole Produce of Labor*, p. 12, note.

of humanity clearly demands the death of an individual (except in cases of criminals, which we shall consider in a later chapter) in actual practice, there is almost always an actual right in the individual to have social arrangements so ordered and administered that he may be guaranteed at least a subsistence so long as he renders to society the services of which he is capable. But the existence of an absolute right even to life we deny, as we have denied all other absolute rights; and with this denial disappears the right to labor or subsistence as an absolute right.

**Conclusion: Kant, Fichte, Hegel, Green.** — The conclusions to which we have been brought are such as follow logically from our acceptance of the principles of idealistic ethics. It is thus but natural that we should find in the writings of Kant, Fichte, Hegel, Ahrens, Green, and their followers the nearest approach to our own views.

The central conception in the views of these philosophers, as to the ethical justification for property, lies in the relation which private ownership bears to the realization of the will of the owner. Thus, as Ahrens says in his *Naturrecht*: "Law consists in the group of conditions necessary for the physical and spiritual development of man, so far as these conditions are dependent on human will. Property is the realization of the sum of the means and conditions necessary for the development, physical or spiritual, of each individual, in quality or quantity conformable to his rational wants. . . . For every man

property is a condition of his existence and development. It is based on the actual nature of man, and should therefore be regarded as an original, absolute right which is not the result of any outward act, such as occupation, labor, or contract. The right springing directly from human nature, the title of being a man is sufficient to confer a right of property."

The claim of right to a given piece of property, then, according to the idealistic conception, depends upon the fact that the claimant deems its possession necessary to him for the realization of his will. This is what Kant means when he says, "Anything is mine by right, or is rightfully mine, when I am so connected with it that if any other person should make use of it without my consent he would do me a lesion or injury;"<sup>1</sup> and again, "The mode of having something external to myself as mine consists in a specially juridical [ethical] connection of the will of the subject with that object, independently of the empirical relations to it in space and in time, and in accordance with the conception of a rational possession."<sup>2</sup>

The position of Hegel as to the rationality of private property does not differ essentially from that of Kant, as may be seen from the following quotations from his *Philosophy of Right*:<sup>3</sup> —

"A person must give to his freedom an external sphere in order that he may reach the completeness implied in the idea. . . . The reasonableness of

<sup>1</sup> *Philosophy of Law*, translated by Hastie, p. 61.

<sup>2</sup> *Idem*, p. 74.

<sup>3</sup> Translated by S. W. Dyde.

property consists in its satisfying our needs. . . . It is in possession first of all that the person becomes rational.”<sup>1</sup> “When I, as a free will, am in possession of something, I get a tangible existence, and in this way first become an actual will. This is the true and legal [ethical] nature of property, and constitutes its distinctive character.”<sup>2</sup> “The doctrine that the foundation of property lies in the will, that property is ‘realized will,’ is true enough if we attach a certain meaning to ‘will’; if we understand by it, not the momentary spring of any and every spontaneous action, but a constant principle, operative in all men qualified for any form of society, however frequently overborne by passing impulses, in virtue of which each seeks to give reality to the conception of a well-being which he necessarily regards as common to himself with others.”<sup>3</sup> “The rationale of property . . . is that every one should be secured by society in the power of getting and keeping the means of realizing a will which in possibility is a will directed to social good.”<sup>4</sup>

In the lectures of T. H. Green on the *Principles of Political Obligation*, we find the thought of Kant and Hegel substantially reproduced. The following extracts will sufficiently indicate this:—

“Appropriation,” he says, “is an expression of will; of the individual effort to give reality to a conception of his own good; of his consciousness of a possible self-satisfaction as an object to be attained.

<sup>1</sup> *Op. cit.*, § 41.

<sup>2</sup> *Op. cit.*, § 45.

<sup>3</sup> *Op. cit.*, § 217.

<sup>4</sup> *Op. cit.*, § 221.

It is different from mere provision to supply a future want. Such provision appears to be made by certain animals, *e.g.* ants.” But in individuals appropriations “are not merely a passing employment of such materials as can be laid hands on to satisfy this or that want, present or future, felt or imagined, but reflect the consciousness of a subject which distinguishes itself from its wants.”<sup>1</sup>

“The rationale of property . . . requires that every one who will conform to the positive condition of possessing it, viz. labor, and the negative condition, viz. respect for it as possessed by others, should, so far as social arrangements can make him so, be a possessor of property himself, and of such property as will at least enable him to develop a sense of responsibility, as distinct from mere property in the immediate necessities of life.”<sup>2</sup>

As regards private ownership of land in particular, Green has the following to say: “The only justification for this appropriation [of land], or for any other, is that it contributes on the whole to social well-being, that the earth as appropriated by individuals under certain conditions becomes more serviceable to society as a whole, including those who are not proprietors of the soil, than if it were held in common. The justification disappears if these conditions are not observed.”<sup>3</sup> “But it is important to bear in mind that the question in regard to land stands on a different footing from that in regard to wealth generally, owing to the fact that land is a particu-

<sup>1</sup> *Op. cit.*, § 213.

<sup>2</sup> *Op. cit.*, § 229.

<sup>3</sup> *Op. cit.*, § 231.

lar commodity limited in extent, from which alone can be derived the materials necessary to any industry whatever, on which men must find house-room if they are to find it at all, and over which they must pass in communicating with each other, however much water or even air may be used for that purpose. These are indeed not reasons for preventing private property in land or even for bequest of land, but they necessitate a special control over the exercise of rights of property in land.”<sup>1</sup>

The all-important result which follows from the basis which these writers, and which we, following them, give to private property is that, while the rightfulness of property may in some cases be denied where its legality is now recognized, in those cases in which private ownership is authorized a far deeper moral sanction is furnished than could ever be obtained from such empirical facts as occupation or labor. All private property now becomes in essence a trust, and implies an obligation upon the owner to utilize the advantages which its possession brings for the promotion of the true welfare of himself and humanity. And thus we accept as a correct statement the recent declaration of Wundt, that “only that kind of property is morally justified which is used for moral purposes. Whatever idle or wasteful use of property exists, by throwing it away for selfish purposes, without any consideration for the welfare of society, is immoral.”

But, as in the case of our definition of justice in

<sup>1</sup> *Op. cit.*, § 231.

general, there are probably those who will say: "All this is true enough, but it is very vague. You say that property and, in fact, all advantages and benefits are to be distributed according to needs. But how are we to know in any particular case just what justice demands?" To this we can but repeat that, from the essential nature of the case, such explicit guidance is beyond the power of any system of ethics. The life which we lead is a complex one, and the realization of one's highest self is not a simple matter. It is one that requires our whole thought and highest effort. No simple thumb rules can guide. All, then, that we can say—all that any ethical teacher, whatever his doctrines, can say—is that, in each instance where an act is required, one must examine it as to all its possible results, proximate and ultimate, objective and subjective, and then ask himself whether the given line of conduct is more calculated than any other possible line of conduct to advance the world toward the realization of the highest ethical perfection.



## PART II

### CHAPTER VIII

#### THE RIGHT OF COERCION

IN the preface to his *Philosophy of Right* Hegel says: "Man cannot be limited to what is presented to him, but maintains that he has the standard of right within himself. He may be subject to the necessity and force of external authority, but not in the same way as he is to the necessity of nature, for always his inner being says to him how a thing ought to be, and within himself he finds the confirmation or lack of confirmation of what is generally accepted. In nature the highest truth is that a law is. In right a thing is not valid because it is, since every one demands that it shall conform to his standard. Hence arises a possible conflict between what is and what ought to be; between absolute unchanging right and the arbitrary decision of what ought to be right."

Thus, as Hegel goes on to show, this unique privilege which belongs to man, his rationality, seems inevitably to lead to strife and discontent. Yet, if we are true to ourselves, we must "openly meet and face our reason and consider the rationality of right."

Never more, perhaps, than at the present time, has there been need for the firm fixing in men's minds of logical principles of justice, in accordance with which they may test the rightfulness of existing social and political institutions and standards. For never before has the critical spirit been more widespread. Now, as in the sophistic period of Greece, the binding power of tradition and the necessarily sacrosanct character of the demands both of State and Church are questioned. All things are tested, and only those pronounced good which are found rational, consonant with the critic's own canons of truth and reason. Hence the danger lest this decentralization or individualization of moral authority result in a decentralization of moral obligation which, if not regulated by well-established principles of conduct, will give free play to individual prejudices or passions, with a resulting loosening of social and political bonds.

This danger assumes a very grave form when it is united, as it sometimes is, to that other doctrine which declares that present social and economic conditions are inherently bad, as providing for a régime in which the many are pitilessly sacrificed for the good of the few. In the entertaining but sophistical work of Mr. Kidd entitled *Social Evolution*, the attempt is made to give to this declaration a pseudo-scientific form, and one apparently founded on the prevalent evolutionary doctrines of struggle for existence and survival of the fittest. As declared by Mr. Kidd, self-interest would urge the majority to put an end, if possible, to such a condition of

affairs, even though to do so would possibly be to sacrifice the welfare of future generations. Why men have not done so, he says, has been due to the teachings of the Church, which has promised greater joys in a world hereafter, and enjoined subordination of self to society as the divinely appointed means of attaining them. In other words, it is argued that a supernatural sanction to social good has been made to overrule the purely rational demand for self-good. The necessary implication from this is that, with the waning power of the Church to govern men's temporal action by simple dicta, and the corresponding increase in the tendency to elevate right reason as the touchstone of all obligation, the present régime will be subjected to greater and greater criticisms and attacks.<sup>1</sup>

The assumptions made in the above, both as to the essential irrationality of social subordination and as to the peculiar characteristics of religion are unwarranted; but the fact that they are made and widely accepted serves to show one of the tendencies of the thought of the age. The only way in which such appeals to the reason of man can be met is by the counter demonstration of the rationality of the doctrines and the institutions which they decry.

Coercion means restraint, the hindrance of one's freedom of action. Before, then, we can consider coercion, we must determine what we mean by freedom. Professor Hyslop points out in his *Elements of Ethics* that the idea of " freedom " is susceptible of

<sup>1</sup> We shall return to Kidd's theories in our next chapter.

three distinct meanings. To these he applies the terms "Velleity," "Spontaneity," and "Liberty." Velleity refers to that capacity of alternative choice which in ethical philosophy has received the name "freedom of will." Spontaneity refers to subjective causation; that is to say, to the initiation of one's own act whether consciously or unconsciously originated. Liberty is defined as exemption from external restraint—a restraint which "may be either physical or social, the latter being meant to include all political restriction upon human action." Professor Hyslop continues: "We call a person free, or assert that he has liberty, when external forces either do not determine his action or do not determine the circumstances limiting the alternatives between which he has to choose. . . . A man who can do as he pleases without suffering a penalty for it is said to have his liberty, or to be free. . . . Climate, gravitation, seasons, geographical conditions, political institutions, economic conditions, and a thousand other influences are at work to limit the satisfaction of desire. To that extent we can say that we are not free, whereby we mean merely that we cannot do as we please without incurring disagreeable consequences. Hence freedom or liberty, used to describe exemption from these restraints, means only a condition in which we act according to our natural desires. The term is used most frequently to describe a political condition,—political liberty, whereby we mean exemption from the laws, customs, and restraints which put one man in subjection to the will of

others. But in this sense no man is absolutely free. Any one is under some restrictions, and perhaps ought to be. They do not compel him to act in a given way, but make the alternative so unpleasant that none except the permitted course will probably be chosen. In this sense freedom or liberty is a privilege rather than a power, a privilege to act with impunity rather than the faculty of alternative action. Thus a man is not at liberty to commit murder and escape the risks of punishment, but he has the power to commit murder and to accept the penalty, or not to commit it, and thus to be free from risk."<sup>1</sup>

Now, it will not be questioned that the essence of morality consists in the use of one's faculty of alternative choice. But if this be so, neither the State nor any other external power is able to limit one's moral freedom,—to restrain the power of conceiving ends, and directing one's conduct to the realization of the chosen end. Certain pleasant or unpleasant results may be made consequent upon the performance of particular acts, but the choice itself, the exercise of the faculty of velleity, cannot be determined or controlled. Thus the citizen is ever at liberty to choose whether or not he will obey the commands of his government, or conform to the requirements of social conventions; though, to be sure, in arriving at his decision he has to take into account the penalties which the State or public opinion attaches to disobedience to its orders. But the

<sup>1</sup> *The Elements of Ethics*, p. 153.

decision that he does arrive at, whether of a positive or negative character, is his own decision, based upon all pertinent circumstances, and he is morally responsible therefor.

In exactly the same way a man has the power of determining whether or not he will leap from some great altitude, or perform any other dangerous act. In such cases his actual choice is of course practically controlled by the fact that bodily injury will result in the one case and not in the other. Yet there is no one would maintain that it is immoral, or at least needful of moral justification, that natural, *i.e.* physical, laws should impose this limitation upon one's desire freely to exercise his own muscular powers.

The thought immediately arises, however, that there is an essential distinction between the restraints and penalties which nature imposes and those which human authority creates. There is indeed a difference, and a very important one. This is, that the coercion of nature is beyond our control, and therefore one for which no human being or beings can be held responsible; whereas social and political restraints are artificially created, and therefore, as to any particular exercise of them, within our power either to limit or abolish. Nevertheless, looked at generally, in our world at least, absolute and universal freedom from restraints humanly imposed is as impossible as release from the limitations of physical environment.

Were we in a world in which the apparent interests, and therefore the desires, of individuals never

conflicted, it would be possible to imagine a society in which human coercion of every form should be absent. For under such circumstances no individual would even want to do anything that any other individuals would object to his doing, or would desire others to do anything that such others would not themselves desire to do. As soon, however, as conflicts of interest arise either between different individuals, or between particular individuals and the society of which they are members, or between different societies or States, the appearance of restraints humanly imposed becomes a necessity. For where interests conflict, desires conflict; and where desires conflict, all cannot be satisfied. Either each will have to yield in part, or one or more will have to give way completely to the others. Thus it follows that if one individual claim a "right" to demand that others shall refrain from certain actions which, though prompted by their own natural desires, interfere with his own freedom, those other individuals cannot be considered as free from all limitations other than those imposed by physical laws. The assumption, therefore, of an *a priori* freedom, or liberty in its socio-political sense, is self-contradictory. To maintain it as to the one individual is to deny it as to all other individuals; while to maintain it as to all individuals (which, if it be a moral right, would be logically necessary) is to deny it as to any particular individual.

In fine, then, in any such world as we now live in, the question is not as to whether any human coer-

cion shall exist, nor even as to how much of it there shall be. For the amount of restraint that must exist is absolutely fixed by the extent to which interests conflict. We can decrease socio-political restraints only as we harmonize interests. Taking, then, any given society of men in which interests have not been absolutely harmonized, the sole questions that can rationally be asked are as to which of conflicting desires shall be satisfied, and what form the necessary restraint shall take.

When we consider the right of the State to be in this light, we see that the alternative is not between coercion and freedom, but between coercion by law and coercion by individual force.

The individual is not endowed with a natural right to freedom. Nature gives to him only powers, and in any non-political state the amount of compulsion that he would suffer at the hands of others would far exceed that exercised by any government. By the creation of a political authority, there is merely a substitution of a general, definite, paramount force for an uncertain, arbitrary, individual force. With the social life of men, antagonism between their respective interests and spheres of activity is a metaphysical necessity. Absolute freedom of every one to do as he likes is, therefore, out of the question. The only question is whether these conflicts shall be settled by the particular strength given by nature to each individual, or whether the compulsion shall be supplied by a general authority created by a union of strengths.

This is sufficient to dispose of the argument that men are born free, but are by the establishment of civil government reduced to servitude. But we may go farther than this, and declare that in an original and lawless state of nature such as is posited by some, not even the thought or idea of a right to freedom from human coercion could arise.

In another work, where I have examined the reasoning contained in the doctrines of "natural law" and of "social compact," I have written substantially as follows:—

"Having now reduced so-called Natural Law to its proper ideal, relative, moral character, we have finally to show that, even in this sense, the term is not applicable to any form of regulation that can conceivably exist in a completely non-social, non-political "State of Nature" such as is necessarily postulated by Contract writers as the condition from which the establishment of political life relieved mankind. That is to say, we have to demonstrate that, when in a "State of Nature" men are said to be ruled by "Laws of Nature," these laws cannot be held to be of even a moral validity. That, therefore, when the original contract is held to rest upon, as Hobbes says, that Law of Nature, 'that men perform their covenants made,'<sup>1</sup> an assumption is made that cannot be logically justified.

"That this is so, we may see by picturing again to ourselves just what would be the condition of mankind in a completely non-political state. In such a

<sup>1</sup> *Leviathan*, Chapter XV.

‘State of Nature,’ there is, *ex hypothesi*, an utter and entire absence of human association and concert of action, the only rules for the regulation of conduct that can possibly obtain being Natural Laws, as used in that sense which identifies them with the natural instincts of all living beings, men and brutes alike, to maintain their own existences, and to satisfy the desires that their own natures give rise to. Under such a régime, passion and momentary inclination necessarily have full sway, and an unmitigated and pitiless struggle for existence prevails.

“ It need not be said, then, that under such conditions there cannot arise in the minds of individuals any recognition of ‘rights’ on the part of other individuals which should be respected by them independently of their power to maintain them. Thus defining ‘right’ as a man’s capacity of influencing the acts of another by means other than his own strength, we may agree with Green that ‘natural right as right in a State of Nature which is not a state of society, is a contradiction. There can be no right without a consciousness of common interest on the part of members of a society. Without this there might be certain *powers* on the part of individuals, but no recognition of these powers by others as powers of which they should allow the exercise, nor any claim to such recognition ; and without this recognition or claim to recognition there can be no right.’<sup>1</sup>

<sup>1</sup> T. H. Green, “Lectures on the Principles of Political Obligation,” *Philosophical Works*, Vol. II, p. 354.

“In the absence, then, of ‘rights,’ as distinct from ‘powers,’ the term ‘morality’ can have no application to a State of Nature as above considered. For morality, in at least its social aspect, has no other basis than the recognition and respect of others’ rights. The same is true of the term ‘justice,’ by which is meant the giving to each one his proper ‘rights.’ Hence follows the truth of the thesis stated above, that in such a non-civic state there cannot arise even the sense of a moral obligation to observe covenants entered into. In fact, the mere propounding of the question, ‘Why should I be forced to do this or that?’ implies that I claim a certain freedom that should be respected by others independently of my power to maintain it.”<sup>1</sup>

In that extremely interesting work of Mr. W. S. Lilly entitled *Right and Wrong*, it is said: “Unquestionably, it is society alone that gives validity to right, for man is, in Aristotle’s phrase, a political animal. If we follow the historical method only, we must pronounce the birthplace of right to have been the family, from which civil polity has been developed. But if we view the matter ideally, we must say that the experience of the race is merely the occasion, not the cause; it does not create, it merely reveals right. The social organism exhibits that which lies in the nature of man, deep down in the inmost recesses of his being, but which could never have come out of him in isolation. The idea of right unfolds itself in history as the vivifying

<sup>1</sup> *The Nature of the State*, pp. 106-110.

principle of those public ordinances and political institutions whereby we live as civilized men; the justification of the common might which without it would be mere brute force."

Mr. Lilly has here stated in his usual delightful style an essential truth and yet, we fear, enveloped it in some ambiguity by the use of the abstract term "right" to express two essentially different things. We may, and in fact must, grant that there does exist, apart from all human creation or control, an eternal distinction between right and wrong, and that similarly there are certain eternal canons of conduct, or criteria, in accordance with which the morality and justice of every act is to be finally determined, and that these principles may be subsumed under the abstract term "right." In this sense, society or State does not create right, but only renders more possible of realization the practical principles which are to be deduced from its recognition. But *rights*, that is, claims of the individual to certain spheres of activity within which he shall not be limited by other individuals,—these are not only rendered possible of realization by society and the State, but they are created by society and the State, and cannot be conceived as existing either actively or potentially apart from the social and political body. They have a significance only in connection with social and political aggregates. *Right*, as we have defined it, may exist apart from human association; *rights*, never.

In the work from which I have above quoted, I

concluded my argument by declaring that "we thus find that the demand for a moral justification of the State is an unnecessary one. If political government does not render the individual less free than he would be without it, its authority does not require a moral justification. There is no presumption of unwarranted interference to be rebutted."<sup>1</sup>

The accusation has been made by an able critic that there is a confusion of thought in at least some of the points made in the foregoing paragraphs. After quoting with approval the assertion that, paradoxical as it may seem, it is true that freedom exists only because there is restraint, this critic continues: "But because this is so, and more liberty is created than is abridged by the State, it does not follow that the problem he set out to resolve can be disposed of by saying that it was falsely stated, and that a moral justification of the State is shown to be unnecessary. The liberty that is the fruit of political organization is not that freedom of choice inherent in morality which as more or less limited by the State (so far as it is an authoritative institution) alone gives rise to any fundamental moral problem. There are really two senses of the word 'freedom.' According to one, we are free when we can *do* what we will. According to the other, we are free when we can choose what we will do. The one relates rather to the act externally considered; the other to the psychological conditions antecedent to the act (neither, we may add, involving any metaphysical 'freedom of the

<sup>1</sup> *The Nature of the State*, p. 111.

will'). Because positive or external freedom is increased by the State, it does not follow that freedom in the other sense is not abridged or, in some cases, denied. The individual does not *choose* what taxes he will pay, but he *has* to pay them. Both as to the amount and as to the paying, he is subject to an external authority, and the problem from the ethical side is, How is this authority to be justified?"<sup>1</sup>

As for the criticism that a discrimination has not been made between the two senses of freedom—freedom to do and freedom to choose—it would appear that the critic is himself confused. We admit that there is a real distinction between doing and choosing, and that morality attaches to the latter rather than to the former. But this freedom of choice, as subject to ethical estimate, can only refer to that capacity of alternative choice of ends to which we have applied the term "velleity," and over which, as we have already said, the State can have no possible control. If an act be brought about by physical force, actually and coercively applied, as where one by brute strength compels another against his will and against his physical resistance to commit a certain act, that act certainly is such a compelled act as releases the compelled one from all moral responsibility. But if the compulsion consist merely in the threat of certain penalties in case of its non-performance, there still remains a moral responsibility upon the individual, though it is a responsibility that has

<sup>1</sup> *International Journal of Ethics*, October, 1896, p. 116. Review by Mr. William M. Salter of my book, *The Nature of the State*.

to be determined in the light of the new conditions which have been introduced by the sanction of the State and the threat of punishment in case of disobedience.

It must be admitted, however, that the assertion that there is not needed a moral justification for the control of the State was too baldly stated. Still, I think that the argument which it concluded made it sufficiently plain that what was there intended to be maintained was that the demand for an abstract or *a priori* justification of the right of State control, or in fact of any form of coercion, is an illegitimate one. To ask the question whether the State has a right to be, without reference to a particular State, is as little sensible as to ask whether a picture is beautiful without designating some particular one to which the judgment is to be applied.

It undoubtedly appears to most of us as beyond all serious question that all States are justified—that the existence of even the very worst of them is better than would be the anarchical condition that would result from its absence; but there is no theoretical impossibility of a State lacking such a rational basis. The existence of any given State as actually controlled has or has not a moral justification, according to whether or not its activities tend upon the whole to promote the realization of the moral ideal. The only way in which the moral element enters is as to the manner in, and the extent to, which the power of the State is exercised. The “code of morality” of a given community, as including those

rules of human conduct that satisfy the general sense of moral right and justice of that community, whether founded on eternal, immutable principles of right and wrong, upon the dictates of man's conscience as completely autonomous, upon reason, or upon utility as revealed by inherited experience, is necessarily relative to the state of enlightenment, character of religion, economic conditions, and civilization in general of the particular people by whom its provisions are recognized. Taking any code of morality at any one time, the laws of a State are in that light morally justified just to the extent to which they coincide with its provisions. But even in this respect it is to be noticed that in approximating law to ethical commands reference must be had not only to the abstract ethical end to be obtained, but to the practical possibility of attaining that end by the physical compulsion supplied by the law and the very rough means at its disposal for evaluating moral merit or guilt. Also, the still further question is to be considered, whether or not the substitution of legal compulsion for voluntary action, while possibly securing more general conformity to the principle indicated, may not lessen men's feeling of moral obligation in the premises. For where men obey from necessity the ethical duty is soon forgotten.

In thus bringing a particular State to the bar of moral criticism, it is rather its activities than its own right to existence which is brought to trial. The right to be of the political authority itself is not in issue, for, as abstractly considered, that is, apart from

any particular form of organization or manner of operation, there is no basis upon which a judgment may be founded. It is not until the State manifests its power and authority that material is afforded to which moral estimates may be applied. Furthermore, it is to be remarked, though it can hardly be necessary to do so, that in considering the morality of a command of the State there is no pretence that the fact that it is the command of the State enters in any degree as an absolutely determining factor. There is only to be asked by the individual in each particular case whether he, as a morally responsible person, should obey or disobey. The act has a moral or immoral character only as to the individual, and what moral responsibility there is exists only for him.

When the State, however, has commanded a certain line of conduct, that fact, though not determinant of the morality of the command abstractly considered, is yet one which the individual is morally bound to consider in determining what his own actions shall be. While it must be held that the individual has at all times the moral right—nay, that he is morally bound—to refuse obedience to those laws which he deems to be unjust or immoral for any reason, yet he is also bound to take into consideration, in estimating all the consequences of such an act, that disobedience to a command of the State will tend to weaken to some extent the reverence for law in general, and will thus have an influence in dissolving those social and political bonds that in the aggregate promote to such a degree the realization

of morality as a whole. The moral right of resistance as well as of revolution cannot be denied, but it is a right only to be justified by a consideration of all the consequences, proximate and ultimate, individual and social, which attend its exercise.

The question is sometimes asked whether the State itself has moral duties. This may be answered in the negative. Considered in itself the State is not a moral entity; it owes no responsibility to any superior being or power; it has no conscience. Nor has a People, when considered as a political unity as distinguished from the arithmetical sum of its constituent individuals. Morality applies only to human individuals. These have moral duties of a threefold character: First, such as belong to them as independent and distinct individuals; that is, the duties which they owe to themselves alone. Secondly, they have duties as social beings; that is, duties not directly connected with personal matters, but with the welfare of the society to which they belong. Thirdly, they are under moral obligations that arise from their society being politically organized; that is, constituting a State. From the common recognition by individuals that it is their duty to make the State subserve moral ends, there is created a moral ideal for the State which does not correspond exactly with the ideal of any one individual, but is rather a sublimation of all individual ideals. But the responsibility of seeing that this moral ideal is striven for rests ultimately with the individuals. Not all contribute alike to the formation of the will of the

State, and hence, just to the extent to which one does contribute by his influence to the formation of an effective political opinion, he is under moral obligation to make that political opinion moral in character and directed to the securing of the highest possible ethical ideals.

The moral responsibility for all political action may not, therefore, be shifted, either in whole or in part, upon an abstract political being, but rests wholly upon the individuals, whether they be public officials or private citizens; and this in exact proportion not only to the extent to which they actually do have an influence in directing the course of public affairs, but to the extent to which it lies within their individual powers, should they use their real opportunities, to direct the power of the State to the attainment of its proper ends.

Repeating, then, by way of summary, the general results of our inquiry regarding the rightfulness of political restraint, we may say that freedom and restraint are but the obverse sides of the same shield, — that freedom has no meaning apart from restraint, and that thus metaphysically as well as practically the two conceptions are united. Just as the individual has no “right” to freedom as opposed to state constraint, so the State has no general right (except in the legal sense) to compel the individual. The presumption is neither way. In practice the assertion of an authority whether by the individual or by the State is limited by physical might, and in each individual case where there is a conflict, it is a proper

subject for ethical inquiry as to whether the act commanded by the State or desired by the individual is morally the preferable. There is no distinction in ethical kind between the two authorities. The existence of the State can only be morally justified if, as a whole, its influence tends to promote the realization of moral ends. It is not to be justified in itself; that is, independently of the manner in which its might is actually exercised. Considered abstractly as a political entity, as simply an institution, it neither possesses moral responsibility, nor can it either determine the morality of an act or limit the moral freedom of the individual. Resting upon no superhuman basis, it cannot legislate in the ethical field. Unrelated to any superior being, and having no concrete existence apart from the individual beings of whom it is composed, and having a continued identity only as conceived apart from them, it is necessarily without moral responsibility. Limited in its means of coercion to physical penalties, it cannot limit man's velleity or freedom of alternative choice.

There are two distinct ways in which we may attempt the positive justification of a given social control. The one is utilitarian, the other transcendental. The one denies outright that self-interest, when enlightened, is an anti-social motive; the other seeks to show that man, by his very nature, is actuated by certain motive forces which can only find free play, and is destined to a certain end which can only be approached, in a social state in which men practice mutual forbearance toward one another, and

recognize a general subordination to some sort of social or political control. Comte, Mill, and Spencer are probably the leading representatives of the first method; Hegel, Green, and their idealistic followers the chief exponents of the second. Both schools admit that the individual reason must, in the last resort, be the absolute judge of the rightfulness of a given control which is exercised over him, but they differ both as to character and as to the origin of the motives which should control that judgment. According to the positivists, social relationships provide not only the medium in which morality is exercised, but the instruments through which the moral instinct is itself created. The governing motive is held to be always utilitarian, though not in the bald Benthamistic sense, but in the universalistic sense of Mill, or the rationalistic, evolutionary sense of Spencer. According to the idealists, or transcendentalists, on the other hand, man is by nature, potentially at least, a moral being, and the social state, though not the creator of the sense of ethical obligation, furnishes the means through which alone is presented the possibility of its concrete application. The motive which they predicate is self-realization, the attainment of that personal perfection the desire for the attainment of which is innate in man, as is discoverable by a metaphysical inquiry into his spiritual and intellectual nature, and his relation to the Divine or Absolute Reason.

A justification of a right of control, whether by society, the State, or the individual, must take the

form of a discussion of the arguments advanced in support of these two positions as just described.

The one idea that none of us can get away from is that, abstractly considered, freedom to act is preferable to coercion, whether actual or threatened. And we are quite right in this, for coercion, or a threat of a penalty which amounts to coercion, is necessarily an evil, for its effect is to hinder the coerced one from doing that which he otherwise would have desired to do; and to be thwarted in one's desires is painful, and pain, we must concede, is an evil. Therefore Fitzjames Stephen is not quite correct when he says that to ask whether freedom be a good or a bad thing, without first stating for what purpose it is to be used, is like asking whether fire is good or bad.<sup>1</sup> Coercion, whatever may be its ultimate effect, is in its immediate application productive of pain.

Admitting all this, however,—admitting that coercion necessarily causes pain, and that pain is an evil,—we may still ask whether pain is the only or the greatest evil. Utilitarians say that it is. If we grant this to be so, we are still not excluded from the possibility of justifying the right of a State to be. For, as we have already shown, coercion, and a great deal of it, necessarily exists in a non-civic state. If, then, it be shown, as of course it can be, that a given political power, by preventing individual lawlessness, lessens coercion by a

<sup>1</sup> The statement is made somewhere in his *Liberty, Equality, Fraternity*.

greater amount than it increases it by exaction of obedience to its own commands, the existence of such a State, viewing it as a whole, and from a neutral standpoint,<sup>1</sup> is justified upon purely utilitarian grounds.

There are, however, several observations to be made regarding a State so justified. In the first place, when looked at in this light, the existence of a political power assumes the form of a necessary evil, and as such, it would seem that, logically, its activities should be kept within the narrowest bounds possible. For if the State's coercion is tolerated only because it prevents a greater private coercion, then anything that goes beyond this purely negative function will add to, rather than subtract from, the aggregate of coercion to which the citizen is subjected. This is precisely the position we find Bentham and J. S. Mill assuming.<sup>2</sup>

Bentham begins by defining "liberty" as simply being left free whether to do good or evil. Those who declare that liberty consists merely in the right of doing everything which is not injurious to another, he says, pervert language; they refuse to employ the word "liberty" in its common acceptation. "Is not the liberty to do evil, liberty?" he asks. "If not, what is it?" Law, therefore, except where merely declaratory, he asserts, is necessarily contrary

<sup>1</sup> This qualification, "from a neutral standpoint," is, as we shall see, important.

<sup>2</sup> Spencer takes practically the same position, but founds it upon different reasoning. We shall have occasion to consider his theories upon this point in our next chapter.

to liberty. And he continues: "But every restriction imposed upon liberty is subject to be followed by a natural sentiment of pain, greater or less; and that independently of an infinite variety of inconveniences and sufferings, which may result from the particular manner of this restriction. It follows, then, that no restriction ought to be imposed, no power conferred, no coercive law sanctioned, without a sufficient and specific reason. There is always a reason against every coercive law—a reason which, in default of any opposing reason, will always be sufficient in itself; and that reason is, that such a law is an absolute attack upon liberty. He who proposes a coercive law ought to be ready to prove, not only that there is a specific reason in favor of it, but that this reason is of more weight than the general reason against every such law."<sup>1</sup>

Mill's position is stated in his essay *On Liberty*. After justifying the existence of the State by asserting that "all that makes existence valuable to any one depends on the enforcement of restraints upon the actions of other people," he says: "The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of

<sup>1</sup> *Principles of the Civil Code*, p. 94.

action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body or mind, the individual is sovereign.”<sup>1</sup>

When Mill in the next to the last sentence uses the expression “of right,” he is of course not referring to “natural right,” for this idea he has, or at least declares that he has, abandoned as invalid. He must therefore mean, of right as determined by utilitarian canons. And this being so, his conclusion that what concerns wholly the individual himself cannot of right be controlled by others, must be founded on the assumption that, however well

<sup>1</sup> *Op. cit.*, Chapter I.

wishing this coercing power, the individual is the only one absolutely qualified to determine what line of conduct will produce for him the greatest amount of happiness. This, as a mere matter of fact, is very doubtful. That an individual can tell for himself what act will be immediately productive of the greatest pleasure may possibly be true. But that he can determine what, remote as well as proximate consequences being considered, will be the relative happiness-producing powers of different modes of life, we know to be false, as our conduct, for instance, in relation to children and the weak-minded constantly proves. Mill, in fact, recognizes this himself, for he says: "It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood." Nor does it apply, he says, to the backward races. "Despotism," he declares, "is a legitimate mode of government in dealing with barbarians, provided the end be their improvement and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion."

Fitzjames Stephen, in his *Liberty, Equality, Fraternity*, is quick to seize upon these admissions of Mill, and to show that, in making them, he practically yields the whole question. For, as Stephen

points out, no one attempts the justification of coercion of the individual for the sake of that individual's pleasure except upon the ground that the coercing power is wiser than the coerced one as to what, upon the whole, will be productive of the greatest good. This superior wisdom appears very plainly when the parent is dealing with the child, or a highly civilized race with a barbaric tribe. But that differences in sapience exist among adults of the same community cannot be denied, and therefore, according to the principle necessarily implied in the admissions made by Mill, coercion is justifiable even for the sole purpose of making the coerced ones better or happier. And, as regards the test for discretion which Mill gives, namely, capacity for improvement by free and equal discussion, Stephen asks how many there are, even amongst the highest of civilized peoples, whose minds are fully open to the arguments of abstract reason.

Then, again, there is that objection to Mill's principle which consists in the impossibility of determining just what acts are wholly self-regarding, and therefore to be withdrawn from the social or political control. As a matter of fact, it would not be difficult to show that, in our complex social life, so intimately is the life and prosperity of one individual connected with the life and prosperity of all, very few overt acts are without their social significance. It would, therefore, be easily possible, acting according to the very principles laid down by Mill, to defend a degree of state interference in the lives of

the citizens far beyond that which the world has yet known.

We have not yet, however, reached the vital objection to the utilitarian justification of the right of social or political control. This is that, as a matter of fact, the theory is, when judged from the social standpoint, *i.e.* from the standpoint of the coercing power, absolutely destructive of all individual liberty ; and, when considered from the individual standpoint, *i.e.* from the standpoint of the coerced, incapable of affording any valid ethical ground whatever for the subordination of the welfare of self to that of the whole.

If we take the social standpoint, there is justified any interference, however arbitrary or gross, with the freedom of the particular individual, if the effect of such interference is to increase the happiness of those not coerced. Utilitarians have made strenuous attempts to bridge the chasm between altruism and egoism, but without success. The two ideas are generically distinct, and by no process of development can the one be made to lead to the other. The whole discussion is, however, one that cannot, because of its length, be reproduced here. Nor is it indeed necessary, so well known is it to all ethical students.

On the other hand, if we take the point of view of the individual, it justifies, to be sure, all that interference with the freedom of others which is necessary to prevent them from interfering with the liberty of the individual in question ; so far as the coercion is directly upon him, it can have for him no morally

binding force. For him, in other words, if happiness be the test, the ideal of political order is that he shall be protected against others, but left free himself to do as his desires dictate. The consequence of this is that, as to any individual citizen, it is impossible, upon a utilitarian basis, to erect a social or political control of a morally binding character. In fact, as we believe, all those realistic systems which explain the sense of moral obligation as a product in time of an evolutionary process, and which place the ultimate motive of ethical conduct upon a hedonistic basis, are incapable of explaining the origin of, or of finding a proper place in their systems for, a feeling of rightness in any true sense of the word. Since the feeling of pain and pleasure can be felt and measured as to their amount only by the individuals experiencing them, and as these feelings are the sole criteria of rightness, what the utilitarians call justice is logically reduced to a purely individualistic basis. Upon such a basis it is absolutely hopeless to attempt the erection of a valid system of social or political right. The supreme good must be conceived as an aggregate of individual pleasures, and society must thus appear as nothing more than an aggregate of self-seeking beings, each of whom is morally entitled to subordinate the good of others or of the whole to his own good. And this he may do even though the subordinated good be far greater than the selfish gain secured. Mill and a few others who have followed him have attempted, as we have before said, to deny this, and to hold that the social good is of a higher

order than the individual good. But it is generally conceded that in so doing he and they have introduced a distinction between different goods as to kind, whereas their premises permit a distinction only as to amount.

As opposed to the utilitarian view, the idealistic or transcendental position is that mere happiness is never the supreme end of conduct. The supreme end is ever the realization of a self which is conceived as rational and universal—as a partaker in that Divine Reason which is one and indivisible, but which manifests itself in manifold forms.

The central concept of modern ethics is thus the moral personality of man. This implies that each individual is able, and in fact is irresistibly impelled, to formulate for himself an ideal of perfection toward the attainment of which he is conscious of a moral obligation to strive. This consciousness of obligation which takes the form of a categorical imperative posited by his own reason, carries with it the logical assumptions: first, of a freedom of the will, for without this there would not be even the capacity to obey the obligation which is felt; and, secondly, of an inherent right to be allowed by others to realize in fact, so far as is compatible with their reciprocal rights, those conditions of life which are implied in the ideal of personal development which each frames for himself. These principles are summed up by Kant in the two canons: "Be a person and respect others as persons," and "Act externally in such a manner that the free exercise of thy will may

be able to coexist with the freedom of others according to a universal law.”<sup>1</sup>

In declaring the chief good to be the realization of one’s best self, transcendental ethics necessarily distinguishes between those simple or material wants which the bodily passions and appetites create, and those desires which are the outcome of a craving to secure that moral perfection which the reason presents. The first express a demand for the satisfaction of an immediate want, without reference to, or recognition of, any ulterior end to be realized. The second are the outcome of the developed reason of an individual who is conscious that he is a moral being, who is able to see his life as a whole, to conceive of a possible perfection, and thus to adapt means to its attainment.

This is the point which Green makes when he says: “The reason and will of man have their common ground in that characteristic of being an object to himself which, as we have said, belongs to him so far as the eternal mind, through the medium of an animal organism and under limitations arising from the employment of such a medium, reproduces itself in him. It is in virtue of this self-objectifying principle that he is determined, not simply by natural wants according to natural laws, but by the thought of himself as existing under certain conditions, and as having ends that may be attained and capabilities that may be realized under those conditions. It is thus that he not merely desires, but seeks to satisfy

<sup>1</sup> *Philosophy of Law*, translated by Hastie, p. 46.

himself in gaining the objects of his desire; presents to himself a certain possible state of himself, which in the gratification of his desire he seeks to reach: in short, wills. It is thus, again, that he has the impulse to make himself what he has the possibility of becoming but actually is not, and hence not merely, like the plant or animal, undergoes a process of development, but seeks to, and does, develop himself.”<sup>1</sup>

Logically, of course, our argument, if it would be complete, would need to begin by demonstrating the idealistic assumptions here made as to the essential character of man, his participation in the Divine or Absolute Reason, and, as flowing therefrom, his power of velleity and actuation by motives not ultimately determined by objective environment,—the elaboration, in short, of some such a system as T. H. Green has made in his *Prolegomena to Ethics*. But in this work, which is confessedly directed to the solution of but special problems, it is allowable to assume the above position as proven, and thence to advance to the establishment of a rational system of political right.

Applying now our idealistic principles to the subject of rights, we are led, as was seen in our chapter on “Justice,” to assert that rights in the individual are dependent upon the possession of a capacity and a disposition to employ them for the attainment of some desirable end. Applying them to the subject of political control, we are led to the declaration that

<sup>1</sup> *Prolegomena to Ethics*, § 175.

the existence of a State is justified, as to each one of us, in so far, and only in so far, as it tends by its activities to assist in developing our best selves.

It may appear that our argument has brought us around to that very utilitarian basis which was so expressly disavowed in the earlier portion of this chapter. This may be so in effect as regards the larger number of the actions of mankind; but it is not so as regards the ethical criteria applied. In essential character, this theory stands poles apart from such an evaluation of results as is implied in utilitarianism either of the universalistic or the rationalistic evolutionary type. The one expressly excludes the material self-interest of the critic and demands that every action shall be judged *sub specie æternitatis*, that is, as tested by a principle which may rationally be universalized as a rule of conduct; the other avowedly predicates a self-interest — albeit an enlightened one — as the real determining motive to be followed by the agent. Right actions, according to the one, are founded ultimately upon eternal principles of morality flowing from the essential character of the Divine Reason; according to the other, ethical conduct never rises to a higher character than that of far-seeing prudence. The ultimate aim of the one is the attainment, so far as may be, to a likeness unto the true God; of the other, simply a more perfect adjustment to one's objective environment.<sup>1</sup>

<sup>1</sup> In his *Data of Ethics* (§ 105), Spencer outlines his social ideal as follows: "One who has followed the general argument thus far

From what has been said it will be seen that modern ethical thought makes the source of moral obligation wholly subjective. It denies the possibility of an objective or external ground of obligation of any sort whatsoever. What obligation the human soul feels comes from the recognition of what is right. When we discover that a thing is right, the sense of obligation to seek it is given to us as an original underived feeling. "Moral obligation is the soul's response to acknowledged rectitude."<sup>1</sup>

Starting from this premise, that in the moral field man is self-legislative but yet determined by the idea of a self-perfection, it is possible to harmonize absolutely the ideas of freedom and control, of liberty and law. In so far as the commands of a social or political power are recognized by the individual as being

will not deny that an ideal society may be conceived as so constituted that his spontaneous activities are congruous with the conditions imposed by the social environment formed by other such beings. In many places, and various ways, I have argued that conformably with the laws of evolution in general, and conformably with the laws of organization in particular, there has been, and is, in progress an adaptation of humanity to the social state, changing it in the direction of such an ideal congruity. And the corollary before drawn and here repeated is that the ultimate man is one in whom this process has gone so far as to produce a correspondence between all the promptings of his nature and all the requirements of his life as carried on in society. If so, it is a necessary implication that there exists an ideal code of conduct formulating the behavior of the completely adapted man in the completely evolved society. Such a code is that here called Absolute Ethics as distinguished from Relative Ethics—a code the injunctions of which are alone to be considered as absolutely right in contrast with those that are relatively right or least wrong; and which, as a system of ideal conduct, is to serve as a standard for our guidance in solving, as well as we can, the problems of real conduct."

<sup>1</sup> President J. G. Schurman, in the *Philosophical Review*, article, "The Consciousness of Moral Obligation."

necessary for the realization of his own best good, which, as we have seen, includes the good of others, such commands no longer appear to him as orders from an external power limiting his freedom, but as imperatives addressed to himself by his own reason. In obeying them, therefore, he obeys, in fact, himself. In theory, then, it is possible to conceive of a society so perfectly organized and administered that at the same time that social subordination and obedience is demanded and obtained, the individuals are left absolutely free as being required to do only such acts as their own reason tells them are just.<sup>1</sup>

This does not mean that the individual should feel himself morally bound to obey only those laws which, taken by themselves, he considers just. As we have already pointed out, in refusing obedience to a law of the State, or indeed to a social convention of any sort, he must recognize that such law or convention constitutes an integral part in a general system of rights, and therefore that a violation of it will

<sup>1</sup> "If we try to form the idea of a divine society or community of men—and by a divine society, I mean one that is perfect—we may, without incurring the reproach of manufacturing a utopia, say this much of it. It must have a perfect harmony or unity of all its members, and a perfect variety; and the more intense and thorough the harmony is, the more so must the variety be. A perfect society would have an intense oneness, but this oneness would hold amid an infinite variety of character and experience on the part of its individual members. In musical art, when instruments of various kinds sound different notes, we may have a symphony which is one of the most magnificent expressions of superpersonal feeling that humanity knows: such would be the harmony of a perfect society and such is the dream of the world." S. H. Mellone in the *International Journal of Ethics*, Vol. VIII, p. 73, article, "Some of the Leading Ideas of Comte's Positivism."

tend, not simply to nullify the command in question, but to weaken the efficiency of the whole system. He must therefore consider, before he resists, whether he may not be able to secure an annulment of the objectionable rule in some better manner, or, if this be not possible, whether it will not be preferable to suffer the evil rather than to bring about the harm which a resistance to it will produce. Furthermore he should remember that (to quote Bosanquet), "It is possible for us to acquiesce, as rational beings, in a law and order which on the whole makes for the possibility of asserting our true or universal selves, at the very moment when this law and order is constraining our particular private wills in a way which we resent or even condemn. Such a law and order, maintained by force, which we recognize as on the whole the instrument of our greatest self-affirmation, is a system of rights; and our liberty, or to use a good old expression, our liberties, may be identified with such a system considered as the condition and guarantee of our becoming the best that we have it in us to be, that is, of becoming ourselves. And because such an order is the embodiment up to a certain point of a self or system of will which we recognize as what ought to be, as against the indolence, ignorance, or rebellion of our casual private selves, we may rightly call it a system of self-government, of free government; a system, that is to say, in which ourselves, in one sense, govern ourselves in another sense."<sup>1</sup>

<sup>1</sup> *The Philosophical Theory of the State*, p. 127.

In result, modern political ethics advocates a subordination of the individual to society as a whole, but does so in such a way as not to abate one whit of his personality or freedom, for this subordination is, in essence, not the subordination of his will to a higher social will, but the identification by the individual of the social will with his own will, so that, in obeying the social or political will, the individual obeys his own will purified from selfishness.

We shall be able to bring this idea of obedience without subordination into clearer light by contrasting it with the conceptions of political right which it has supplanted. Looking back over the history of political thought, we find that, roughly speaking, the relation of the individual to the State has been viewed in four aspects. These we may designate by the names, Oriental, Hellenic, Individualistic, and Modern.

In our chapter on "Justice" we called attention to the fact that Greek ethical thought developed the idea of an abstract natural law which was conceived to stand superior to human law. Logically, as we pointed out, this idea could have been made subversive of all political authority. It did not, however, have this effect in Greece. Paradoxical as it may seem, the Hellenes were able to recognize in their political philosophy the independent value of human personality, and at the same time to subject the citizen to the absolute control of the State. According to the Hellenic conception, man was by his very nature a social being. Hence his life in a state of society, with its social conventions and demands, meant, not

an interference with an original independence, but a condition of life necessary to the very existence of men as independent rational beings. To the Greeks, in other words, society and the State were as immediately products of great nature as was man himself. The State had, indeed, in their eyes a higher and more perfect individuality and personality than did its citizens, for it was from its personality and from its life that the citizen was supposed to derive all that was valuable to him as a man. This apotheosis of the State was carried to such a degree that the doctrine of immortality, so far as it was developed by the Greeks, was, for the most part, made applicable only to the civic personality. It is this fact that largely explains why, considering the high development reached by philosophy among the Greeks, comparatively so little discussion centred around the possibility or probable conditions of a life hereafter for mankind. The State's life was eternal, and man's highest aim was conceived to be the contribution of what lay within his power to render that life as glorious as possible.

The consequence of this was that, while the individual had many rights, he had none as opposed to the State. The individual was as completely subordinated to the State in the Hellenic as in the Oriental world. There was, however, this fundamental difference. While the Oriental, in his subjection to the law and to the State, viewed this subordination as an obedience to an external power, the Greek saw in it but a yielding to a higher self,—to a power of which

the citizens were themselves parts. What in the Oriental world was subjection, became in the Greek world self-surrender. President Wheeler, in his recent life of Alexander the Great, states the distinction which we have been attempting to make, in the following manner: "To the Oriental," he says, "the universe as well as the State is conceived of as a vast despotism, which holds in its keeping the source and the law of action for all. Its mysterious law, held beyond the reach of human vision, like the inscrutable will of the autocrat, is the law of fate. Personality knew no right of origination or of self-determination; it was swept like a ship in the current. It knew no privilege except to bow in resignation before the unexplained, unmoved mandate of fate. The Oriental government of the universe was transcendental; the Hellenic, social."<sup>1</sup>

The individualistic phase of political thought was represented in the philosophy of the seventeenth and eighteenth centuries, and was a direct outcome of that central idea of the Protestant Reformation according to which the individual is given the right of passing final judgments as to the meaning of the law. It is true that Luther's mission was to declare simply the emancipation of man from the dogmatic absolutism of the Church, but in doing so the principle was necessarily asserted which freed him from unquestioning obedience to any external authority, political or ecclesiastical.

This freedom, when not controlled and tempered

<sup>1</sup> Chapter I.

by a proper comprehension of the rational limitations under which it should be exercised, led, as is well known, to a gradual denial of the right of all political authority not founded on the assent—explicit or implied—of the individuals subject to it. The movement, in effect, assumed the form of a simple negation of the Oriental idea of subjection, and, as all pure negations are apt to be, was carried over into the opposite extreme, anarchy. In political theory this individualistic philosophy reached its height in the writings of the French philosophical school of the latter half of the eighteenth century. In political fact, it found its culmination in the anarchy of the revolutionary period.

In his admirable little book on Hegel, Professor Caird has stated in a masterly manner the essential thought in the eighteenth century philosophy, showing both the kernel of truth that it contained, and the errors involved in its attempted application.

“The doctrine that nothing ultimately can have truth or even reality for man,” says Caird, “which is not capable of being made his own and identified with his very self, might be understood to mean that the truth of things is at once revealed to the undeveloped consciousness of the savage or of the child, and that the immediate desires of the natural man are his highest law. In the place of the duty of knowing one’s self, and of undergoing all the hard discipline, intellectual and moral, which is necessary in order to know, might be put an assertion of the ‘rights of private judgment,’ which was equivalent

to the proclamation of an anarchy of individual opinion. As the modern struggle for emancipation went on, this ambiguity of the new principle began to reveal itself; and the claims which were first made for the 'spiritual man,' *i.e.* for man in the infinite possibilities of his nature as a rational or self-conscious being, capable of an intellectual and moral life which takes him out of himself, and even of a religious experience which unites him to the infinite, were asserted on behalf of the 'natural man,' *i.e.* of man conceived merely as a finite individual—an atom set among other atoms in a finite world, and incapable of going beyond it, or even beyond himself, either in thought or action. Hence the strange contradiction which we find in the literature of the eighteenth century, which with one hand exalts the individual almost to a god, while with the other it seems to strip off the last veil that hides from him that he is a beast. The practical paradox, that the age in which the claims of humanity were most strongly asserted, is also the age in which human nature was reduced to its lowest terms,—that the age of tolerance, philanthropy, and enlightenment, was also the age of materialism, individualism, and scepticism,—is explicable only if we remember that both equally spring out of the negative form taken by the first assertion of human freedom.

"As the individual thus fell back upon himself, throwing off all relations to that which seemed to be external, the specific religious and social ideas of earlier days lost power over him; and their place

was taken by the abstract idea of God and the abstract idea of the equality and fraternity of men—ideas which seemed to be higher and nobler because they were more general, but which for that very reason were emptied of all definite meaning, as well as of all vital power to hold in check the lusts and贪欲 of man's lower nature. Thus the ambitious but vague proclamation of the religion of nature and the rights of man was closely associated with a theory which reduced man to a mere animal individual, a mere subject of sensations and appetites, incapable either of religion or of morality. For an ethics which is more than a word, and a religion which is more than an aspiration, imply definite relations of men to each other and to God, and all such relations were now rejected as inconsistent with the freedom of the individual. The French Revolution was the practical demonstration that the mere general idea of religion is not a religion, and that the mere general idea of a social unity is not a State, but that such abstractions, inspiring as they may be as weapons of attack upon an old system, leave nothing to build up the new one, except the unchained passions in the natural man.”<sup>1</sup>

In a certain sense, modern ethics appears to distinguish between a higher and a lower self. We say “appears to distinguish,” for in fact but one true self is recognized, and, strictly speaking, there can be no such thing as a will striving against itself. Nevertheless, it is possible for the requirements of a truly

<sup>1</sup> *Op. cit.*, pp. 19–20.

moral life to conflict at times with immediate material desires, and in selecting the former for satisfaction, there does occur what may properly be termed a struggle between our higher and lower natures.

Surprising as it may seem, it was first in the writings of J. J. Rousseau that we find this modern doctrine of a true or higher self as opposed to the untrue or lower self, a "real" will as opposed to an apparent will, attempting to break forth. In his earlier essays, to be sure, Rousseau exalts the "natural man," but in his *Social Contract* there is clearly apparent the idea of a true human liberty that is higher and better than the license of the savage; and in his *volonté générale* we have the conception of a will more real than that expressed by the momentary or selfish inclination of the individual.

Thus, in speaking of benefits to be derived by the establishment of a civil State properly administered, he says: "The passage from the state of nature to the civil State produces in man a very remarkable change, by substituting in his conduct justice for interest, and giving to his actions a moral force which they lacked before. Then only does the voice of duty succeed to physical impulse, and law to appetite, and man, who until then had thought only of himself, sees himself forced to act upon other principles, and to consult his reason before listening to his desires. . . . There ought to be added to the credit side of the civil State, that of moral liberty, which alone renders man master of himself; for the impulse of

one appetite is slavery, and obedience to self-prescribed law is liberty.”<sup>1</sup>

From the above it is clearly apparent that the real meaning at the bottom of Rousseau’s thought, when he says that man is born free, is that he is born for freedom. And when he says that, in fact, men are everywhere in chains, he means, not that this is a necessary result of the civil State, but of a civil State wrongly established and administered.<sup>2</sup> This idea of a distinction between a real and a casual will appears again, where Rousseau makes the point that it is possible for the *volonté générale* to stand in opposition to the individual will. This opposition, he declares, is, however, not real, but comes from the individual having mistaken what his real will is, that is, from his having interpreted a casual or selfish desire as representing his real interest. The *volonté générale* represents his real will, and hence in being compelled to yield to it, the individual is really, as Rousseau says, “forced to be free.”

The error of Rousseau’s reasoning appears when he declares that it is possible to determine this real will of the individual as a *volonté générale*, and to ascertain this *volonté générale* by such a mechanical means as a *plébiscite*. Rousseau recognizes, to be sure, that there is a difference between the *volonté générale* and the *volonté de tous*, in that the one

<sup>1</sup> Book II, Chapter VIII.

<sup>2</sup> Bosanquet in his recent work, *The Philosophical Theory of the State*, makes this point very plain. See especially Chapter IV.

regards the common interest, and the other private interests; but he thinks that the former can be derived from the latter by setting off individual differences against one another. "Take," he says, "from these same wills the plus and the minus, which destroy each other, and there will remain for the sum of the differences the general will."<sup>1</sup>

In the political philosophy of Kant, Rousseau's mechanical idea of a *volonté générale* disappears, and is replaced by the truer conception of a real will as dependent upon the reason of man when purified from all desire. There thus becomes explicit in Kant the idea of the morally self-legislative character of man. Man's conduct, then, as conceived by Kant, so far from being lawless, is limited by those conditions which the reason imposes, and the chief among them is the principle before mentioned that all individuals should be treated as persons, and consequently that all acts should be such as can rationally be made a canon of conduct for all men. Thus Kant defines right as comprehending "the whole of the conditions under which the voluntary actions of any one person can be harmonized in reality with the voluntary actions of every other person, according to a universal law of freedom."<sup>2</sup>

Kant had not, however, emancipated himself from the individualistic philosophy of the eighteenth century. He did not grasp the fundamental truth that the individual can, by recognizing the justice of the

<sup>1</sup> *Op. cit.*, Book II, Chapter III.

<sup>2</sup> *Philosophy of Law*, Hastie translation, p. 45.

will of another power, make that will his very own, and thus, though obeying it, be not coerced by it. He thus, in fact, ever regards the control of the law as necessarily an interference with freedom, and justifiable only when employed to prevent coercion from other sources. He develops, therefore, the pure conception of a *Rechtsstaat*,—a State whose sole legitimate function is to prevent the violations of those principles of rights which the reason lays down as fundamental. The State is thus dragged in, as it were, as a *deus ex machina* to secure to men that freedom to which they are rationally entitled, but which without the State they could not obtain.<sup>1</sup>

The true view which, while recognizing the two necessary elements of self and not self, of liberty and law, yet harmonizes them in a higher unity without destroying them, is first found stated in the

<sup>1</sup> Caird in his monumental work, *The Critical Philosophy of Kant*, has set forth in a masterly manner the inconsistencies in the political reasoning of Kant. We are inclined to think, however, that in doing so Caird has himself erred in giving to the social concept a too independent dignity. At times he speaks of the society as being more than a means for the realization of the good of its constituent individuals. Thus he says in one place: "If, however, it is admitted that a relation of persons may be established, in which they are not as ends exclusive of each other, or in which each, as so exclusive, is only a means, the strict opposition of things and persons, means and ends, disappears in a higher category. We pass, so to speak, from the external teleology of mere design to the higher teleology of organic unity. . . . Under this new category, it becomes possible to understand that man can be an end, only as he is a member of a kingdom of ends, to which he makes himself a means, just as a member of the physical body maintains itself by the very activity in which it subserves the whole organism." It seems to us that this position is open to criticism. See our next chapter.

philosophy of Hegel. Here the old Greek idea is revived, but corrected by rendering that subordination, which to the Greek was an unthinking and almost instinctive submission, a conscious, deliberately chosen subordination. The Greek failed to reach the true view because he recognized but the one element, the will of the State. His thought involved no recognition of the two necessary elements of freedom and authority. In other words, his identification of the individual will with the will of the State was immediate.

In the modern view, on the other hand, the identification is mediate. The two ideas of absolute freedom and absolute subjection are first clearly presented to the mind and then harmonized.<sup>1</sup> Thus, while still retaining the central conception of the "good will," the abstract and impossible Kantian formalism of that will is denied. In its place there is given us the conception of a self that finds its realization in the outer world, in utilizing objective forces and institutions as means for securing that development and perfection which the reason declares. The existence of the State thus, as comprehending the most important of all those forces and facts which are necessary for man's highest life, receives the highest possible sanction. Thus Hegel speaks of the State as the "actualization of freedom,"<sup>2</sup> and as the "embodiment of concrete freedom."<sup>3</sup>

<sup>1</sup> Cf. Caird's "Hegel," in *Blackwood's Philosophical Classics*, Chapter II.

<sup>2</sup> *Philosophy of Right*, translated by Dyde, § 258 addition.

<sup>3</sup> *Idem*, § 260.

“In this concrete freedom,” says Hegel, “personal individuality and its particular interests, as found in the family and civic community, have their complete development. In this concrete freedom, too, the rights of personal individuality receive adequate recognition. These interests and rights pass partly of their own accord into the interest of the individual. Partly, also, do the individuals recognize by their own knowledge and will the universal as their own substantive spirit, and work for it as their own end. Hence, neither is the universal completed without the assistance of the particular interest, knowledge, and will; nor, on the other hand, do individuals, as private persons, live merely for their own special concern. They regard the general end, and are, in all their activities, conscious of this end. The modern State has enormous strength and depth, in that it allows the principle of subjectivity to complete itself to an independent extreme of personal particularity, and yet at the same time brings it back into the substantive unity, and thus preserves particularity in the principles of the State. . . .

“In the republics of classical antiquity, universality, it is true, is to be found. But in those ages particularity had not as yet been released from its fetters, and led back to the universality or the universal purpose of the whole. The essence of the modern State binds together the universal and the full freedom of particularity, including the welfare of individuals. It insists that the interests of the family and the civic community shall link themselves to the

State, and yet is aware that the universal purpose can make no advance without the private knowledge and will of a particularity which must adhere to its right. The universal must be actively furthered, but, on the other side, subjectivity must be wholly and vitally developed. Only when both elements are present in force is the State to be regarded as articulate and truly organized.”<sup>1</sup>

**The Proper Sphere of Coercion.** — The position to assume upon this point is very clearly pointed out in the discussion that has been had as to justification of coercion in general. If, as we have shown, there are properly speaking no abstract rights in the individual which are by their very nature withdrawn from rightful control, it follows that utility — interpreted, of course, in its highest ethical sense — should determine when coercion should be applied.

Thus far the discussion has been limited to the question of the rightfulness of political restraint. The same arguments, however, apply with equal force to all forms of social control, whether exercised through the State, the family, the church, or merely through social disapprobation. In each case the influence exerted may only be justified, as regards the person exerting it, if it be consciously intended to be for the ultimate best of the person controlled or of mankind at large. As regards the one controlled, it may be acquiesced in as just only in so far as that one can himself perceive in it such a tendency ; and the same is true as regards the disinterested critic.

<sup>1</sup> *Op. cit.*, § 260 and addition.

Of course the conditions under which state coercion may be applied differ widely from those under which compulsion may be employed by society in the form of public opinion, or by the individual by a withdrawal of his friendship or financial help, but the motives in all three cases must be, if they would be ethically valid, the same. Fitzjames Stephen has formulated the following conditions that must be satisfied in order to justify any form of compulsion, and which, when satisfied, do positively require it. These are: (1) that the object aimed at be desirable, (2) that the means employed be calculated to obtain it, (3) and at not too great an expense.<sup>1</sup> We accept his position upon this point as absolutely valid.

At first thought this may seem to justify intolerance in matters usually considered beyond the right of control — religious belief and ceremonial, for example. Let us see if this be so.

There is no one who would maintain that we should recognize toleration as an absolute duty; that is, one to be exercised as to all persons and as to all acts. There are always some acts that we will not tolerate, even if performed in the name of religion. What, then, is the logical ground upon which we justify intolerance in such cases, and tolerance in all others? If we are convinced that a certain line of conduct will be for the best interest of another, and if we can by some means make that other adopt that policy without at the same time doing him a greater

<sup>1</sup> In his *Liberty, Equality, Fraternity*.

evil than benefit, is it not really a kindness to him to do so ? If we are firmly convinced, for example, that the failure to accept a certain doctrine will doom the recusant to an eternity of awful torment, and if we are equally sure that coercion will be able to secure the saving acceptance, and without causing an amount of suffering anywhere near as great as that from which the coerced one is to be rescued, can we hesitate to declare that such coercion should be applied ? Have we not, in fact, abandoned intolerance, where we have abandoned it, either because we have changed our minds either as to the desirability of the end sought, or our faith in the efficiency of compulsion to reach it, or to reach it at a not disproportionate expense ?

In taking this ground we emphasize the fact that coercion being in itself painful, the one exercising it is morally bound first to convince himself that the conditions that we have mentioned are certainly present. No one is justified in intolerance, however slight, until he has informed himself by all means within his power as to the rightfulness of his opinion, and until he has taken into careful consideration all the effects, immediate and remote, of an exercise of coercion on his part. When such conditions are strictly observed it will be found, we think, that the doctrine will secure a considerably greater tolerance, individual, social, and political, than now actually obtains in any modern society.

The bearing which the discussion that has gone before has upon the proper attitude of the so-called

higher nations to the lower, less civilized races, is obvious. It can not but be held that, just as there is a duty on the part of a parent or guardian to educate, even with the collateral use of compulsion if necessary, the undeveloped faculties of the child, so it lies within the legitimate province of an enlightened nation to compel—if compulsion be the only and the best means available—the less civilized races to enter into that better social and political life the advantages of which their own ignorance either prevents them from seeing, or securing if seen.

There must be emphasized, however, the conditions under which alone the assumption of such a task by a superior nation is justifiable. In the first place the motive must be an absolutely disinterested one. The work must be undertaken because of the advantage which will accrue to the coerced race, or to humanity. The possibility of incidental advantages to the superior race is not excluded, but cannot properly furnish the motive. In the second place the superior nation should be absolutely sure, not simply that the civilization which it is endeavoring to impress upon the inferior nation is intrinsically better than that which it is to supplant, but that it will be better as related to the peculiar needs and characteristics of the people in question. Finally it should be made manifest that the desired results can better be obtained by compulsion than by any other mode. In this connection there must be taken into consideration all possible consequences, proximate and remote, not only as regards the nations immediately concerned, but as

regards the fact that a compulsion conscientiously undertaken by one nation may furnish a pretext or alleged precedent for a "criminal aggression" on the part of a less conscientious people. Bearing in mind these qualifications, we may accept the language of Professor Burgess when he says:—

"No one can question that it is in the interest of the world's best civilization that law and order and the true liberty consistent therewith shall reign everywhere upon the globe. A permanent inability on the part of any State or semi-State to secure this status is a threat to civilization everywhere. Both for the sake of the half-barbarous State and in the interest of the rest of the world, a State or States, endowed with the capacity for political organization, may righteously assume sovereignty over and undertake to create state order for, such a politically incompetent population. The civilized States should not, of course, act with undue haste in seizing power, and they should never exercise the power, once assumed, for any other purpose than that for which the assumption may be righteously made, viz. for the civilization of the subjected population; but they are under no obligation to await invitation from those claiming power and government in the insufficient organization, nor from those subject to the same. The civilized States themselves are the best organs which have yet appeared in the history of the world for determining the proper time and occasion for intervening in the affairs of the unorganized or insufficiently organized populations, for the execution of

their great world-duty. Indifference on the part of the Teutonic States to the political civilization of the rest of the world is, then, not only mistaken policy, but disregard of duty, and mistaken policy because disregard of duty. In the study of general political science we must be able to find a standpoint from which the harmony of duty and policy may appear. History and ethnology offer us this elevated ground, and they teach us that the Teutonic nations are the political nations of the modern era; that, in the economy of history, the duty has fallen upon them of organizing the world politically; and that, if true to their mission, they must follow the line of this duty as one of their chief practical policies.”<sup>1</sup>

<sup>1</sup> *Political Science and Comparative Constitutional Law*, Vol. I, p. 47 (published in 1893).

## CHAPTER IX

### THE ETHICS OF THE COMPETITIVE PROCESS

THE result of the argument, as carried on in the preceding chapter, has been to show that no absolute or *a priori* principle can be established regarding the proper sphere of social or political control, but that in every case conditions of fact should govern. It has been alleged by some, however, that, starting from such a purely empiric basis, it can be established as a general principle that the coercive power of the State should be kept within the closest limits possible. It is asserted, in short, that this is the lesson taught by a study of the conditions of life generally in the biological world. In the sub-human world, it is said, continued progress and development have been rendered possible solely by the fact that individuals have been forced to bear the consequences which necessarily come from unrestricted competition with the members of their own and other species. By a like competitive process, it is argued, the improvement of the human race may best be secured. The present chapter will be devoted to a consideration of the validity of this position.

The chief exponent of this theory is Mr. Herbert Spencer. The latest and probably final statement of

his views is to be found in his work, *Justice*, which constitutes Part IV of his *Principles of Ethics*.<sup>1</sup>

As is well known, Mr. Spencer is a defender of the theory that the evolutionary process has been able, not only to develop the feeling of moral obligation, but to bring about its very creation from materials which did not originally contain it even in germ. The illogicalness of such a position would seem sufficiently obvious, but is somewhat explained when we consider the essential character which Mr. Spencer ascribes to the ethical idea. "Most people [he says] regard the subject of ethics as being conduct considered as calling forth approbation or reprobation. But the primary subject-matter of ethics is conduct considered objectively as producing good or bad results to self or others, or both."<sup>2</sup> Acting upon such a con-

<sup>1</sup> In addition to the support claimed to be derived from the empiric facts of biological evolution, Mr. Spencer, positivist though he be, relies also upon a bald doctrine of abstract natural rights. In that chapter of his *Justice* which is devoted to the establishment of the authority of the individualistic formula which he has obtained, he avowedly rests it upon an *a priori* ground, and calls to his support the dicta of such men as Blackstone and Mackintosh, wherein they have declared the supreme, invariable, and all-controlling power of natural law. Spencer closes with the truly remarkable argument that "paying some respect to these dicta (to which I may add that of the German jurists with their *Naturrecht*) does not imply unreasoning credulity. We may reasonably suspect that, however much they may be in form open to criticism, they are true in essence." This is truly an argument remarkable, not only because of the method of demonstration involved, but because of the total misconception involved as to the connotation of the term "*Naturrecht*" in German jurisprudence. Mr. Spencer goes on, however, to assign a special and limited character to *a priori* beliefs in general, but in this we need not follow him, as we shall presently cover this point when we examine Mr. Spencer's system from a different standpoint.

<sup>2</sup> *Justice*, p. 3.

ception as this, it is, of course, comparatively easy for him to treat human justice as but an outgrowth from animal or sub-human conduct.

Within this lower world of life it is undoubtedly true that development has been an outcome of a competitive régime in which those less fit, as related to their environment, have been destroyed, and those more fit, in the same sense, have survived and been enabled to transmit their favorable characteristics to their offspring, and thus the gradual evolution of higher, more complex, and better integrated species rendered possible. It is also true that this weeding process has been the result of an order in which each individual has, in the main, had visited upon it the natural effect of its own nature and consequent conduct. It is to be observed, however, that, in order to secure the efficiency of the evolutionary process, there has been demanded the birth of a vastly greater number of individuals than can by any possibility live lives of natural length. In other words, in order to secure the requisite favorable variations, and to obtain the needed intensity of competition, many are called into life, while but few are chosen for a life sufficiently long to enable them to produce offspring. The development of the species has thus ever been at the expense of the great majority of the individuals constituting it. As to this, Mr. Spencer says: "The species has no existence save as an aggregate of individuals, and it is true that, therefore, the welfare of the species is an end to be subserved only as subserving the welfares of individuals.

. . . But [he continues] since the disappearance of the species, implying disappearance of all individuals, involves absolute failure of achieving the end, whereas disappearance of individuals, though carried to a great extent, may leave outstanding such number as can, by the continuance of the species, make subsequent fulfilment of the end possible; the preservation of the individual must, in a variable degree, according to circumstances, be subordinated to the preservation of the species, where the two conflict."<sup>1</sup>

Coming now to human life, Mr. Spencer, finding in it no elements not embraced in sub-human life, applies as necessary to human development the law stated above, that upon each individual should be visited the natural results of his own nature, as judged by the degree of his adaptation to the demands of his environment. This law, he declares, is one not simply of fact, but of moral (as he understands moral) obligation. It becomes, in fact, at once a law of necessity (if there would be human evolution) and a canon of distributive justice. Mr. Spencer therefore holds that any interference on the part of man with the principle which this law declares, is not only unwise, but immoral. He holds, however, that there is an important modification in form, if not in character, of the principle in its application to men, resulting from the gradual recognition by men, due to their increasing intellectuality, that, in order to give this beneficent law the fullest freedom of operation, each individual should recognize in

<sup>1</sup> *Op. cit.*, p. 6.

others the right to the same unimpeded activity which he claims for himself.

Furthermore, he says, the developing intelligence of men leads to the conscious recognition both of the utilitarian basis upon which this rule is founded, and to an acceptance of its essentially obligatory character. In other words, although the principle of distributive justice obtains full sway among sub-human species, it is not recognized as doing so in the minds of those over whose destinies it exercises a control. Only among men does the objective operation of the rule result in the formation of a corresponding subjective feeling that it is right that the individual should submit to the conditions of his natural being and to the requirements of his natural environment, in order that the ultimate good of his species may be subserved, and that it is proper that he should restrain his desires where their satisfaction will imply an undue interference with the freedom of action of others.

“The dread of retaliation, the dread of social dislike, the dread of legal punishment, and the dread of divine vengeance, united in various proportions, form a body of feeling which checks the primitive tendency to pursue the objects of desire without regard to the interests of fellow-men. Containing none of the altruistic sentiment of justice, properly so called, pro-altruistic sentiment of justice serves temporarily to cause respect for one another’s claims, and so to make social coöperation possible.”<sup>1</sup>

<sup>1</sup> *Op. cit.*, p. 30.

This sentiment, thus produced, in time becomes so firmly grounded in the consciousness of men that it is ultimately mistaken, as Mr. Spencer alleges, for an innate feeling. Such, indeed, he holds to be the essential character of all supposedly innate or *a priori* beliefs.<sup>1</sup>

From the premises and argument which we have stated it is easily seen how Mr. Spencer is led to the statement of a doctrine of the proper duties of the State, which limits them to the simple police function of protecting life, liberty, and property. For, as he conceives it, any political control necessarily checks *pro tanto* the beneficent operation of competition.

It will be seen that in this system which we have outlined the competitive régime among men is defended upon both economic and ethical grounds. As regards the manner in which the personal sense of moral obligation is declared to have arisen, we cannot, of course, give our assent. We do not believe it possible to create, by means of the evolutionary process, a product the elements of which are not conceived to have been present in the material from which it is supposed to have evolved. We do not hold it possible, either by means of individual or race experience, to evolve a true altruistic sentiment out of originally selfish feelings. Nor do we hold it a logical *sequitur* that, because a certain law of development is discovered to govern the growth of sen-

<sup>1</sup> "One who accepts the doctrine of evolution is obliged, if he is consistent, to admit that *a priori* beliefs entertained by men at large must have arisen, if not from the experiences of each individual, then from the experiences of the race." — SPENCER, *op. cit.*, p. 55.

tient beings, therefore it is a law which should or ought to govern. But this is obviously not the place for a criticism of such a view. We shall, however, have occasion later on to show that, even apart from these matters, the system of political ethics advocated by Mr. Spencer exhibits characteristics which can be squared neither with his own nor with any other principles of right and justice.

In order to arrive at his individualistic results Mr. Spencer impliedly maintains the following assertions: first, that a régime of practically unrestricted competition between sub-human individuals is necessary for, and in fact does always lead to, the improvement of their species; second, that in this process the interest of the individual may ruthlessly be subordinated to that of the species; third, that what is true of sub-human species is equally true of human beings. These assertions are necessarily implied in the position taken by Mr. Spencer, although in fact he has not proved or attempted to prove the truth of all of them.

As regards the first assertion, all that evolutionary biologists have shown is that, as a matter of fact, a fierce struggle for existence is waged between individuals of the sub-human species, and that the outcome of this has been the gradual development of more complex and better integrated types of life. But this does not preclude the possibility of an evolution by other and perhaps better means, unless, indeed, it should be held that such a suggestion would impugn the wisdom or the goodness of the

Creator, a plea Mr. Spencer could hardly be supposed as willing to advance. As a matter of fact, moreover, as has been shown in the case of domesticated animals, purposive sexual selection, in the absence of competition, is a far more rapid and effective agent of improvement than the elimination of the unfit in a struggle for existence.

Again, as qualifying the effect of Mr. Spencer's first assertion, the connotations of the terms "evolution" and "fittest for survival," as used by the biologist, are to be examined. When this is done it is found that "evolution" is not necessarily synonymous with progress or improvement in any broad or ethical sense; and that the "fitness" implied in the latter phrase has also a peculiar and limited meaning.

In the struggle for existence, in the biologic sense, survival is a demonstration only of adaptation to environment, and as a necessary consequence, the real character of this fitness is wholly determined by the nature of the environment. As Professor Huxley has said in his now famous Romanes Lecture: "In cosmic nature what is fittest depends upon the conditions. . . . If our hemisphere were to cool again, the survival of the fittest might bring about in the vegetable kingdom a population of more and more stunted and humbler and humbler organisms, until the fittest that survived might be nothing but lichens, diatoms, and such microscopic organisms as those which give red snow its color; while, if it became hotter, the pleasant valleys of the Thames and Isis might be uninhabitable by any animated

beings save those that flourish in a tropical jungle. They, as the fittest, the best adapted to changed conditions, would survive.”<sup>1</sup>

In truth, the very conditions of an unrestricted, unthinking struggle for life between individuals render impossible the survival of exceptionally developed types. Where, as a result of an exceptional variation, an individual differs radically from its kind, this very difference, albeit one indicating development, is a disadvantage to it, as rendering it, as it were, out of *rapport* with its environment. Thus the effect of competition everywhere observable in the sub-human world is the prevention of maximum development, and the maintenance in its stead of a comparatively low level of life. The process is thus much like the slow advance of a line of men in battle. Those who rush ahead are the first killed by the enemy.

As regards the truth of that second assertion which we have stated to be implicit in Mr. Spencer's theory, namely, that the interests and even the existence of the individual may rightfully be subordinated to the welfare of the species, a positive denial must be entered, so far at least as regards its application to man. In the manner in which this demand is made by Mr. Spencer, such a sacrifice can be justified according to neither transcendental nor utilitarian systems of ethics. For if, as the transcendentalist holds, man is a partaker in the Divine Reason, and his moral consciousness is therefore a partial mani-

<sup>1</sup> “Evolution and Ethics,” *Collected Essays*, Vol. IX.

festation, as it were, of the World Spirit, he has moral rights and duties as such, and is thus distinguished from a thing. And this being so, it is ethically improper to treat the individual simply as a means to an end, even though that end be the welfare of his race. This, of course, does not mean that the social welfare should under no circumstances be preferred to the individual's good, but only that when one individual, or society at large, assumes to control the actions or destinies of other individuals, the motive should be one in which there is involved the recognition that those other individuals are persons, not things; that they, each of them, are ends unto themselves, and therefore that the action to be taken can only be justified if the object sought to be realized is one which those individuals would themselves recognize to be a desirable one if they were to reason regarding it intelligently and impartially. It is true that in many cases where social coercion may justly be applied, the coerced one may not admit its rightfulness or submit willingly to its operation. In such a conflict superior might finally determines the issue. But if the compelled one be honest and intelligent according to his opportunities, he cannot be said to be immoral in his resistance; nor, on the other hand, if the action of the superior force has been controlled by the principle just stated, can its conduct be condemned. In a society of individuals ethically and intellectually perfect no such conflicts would occur. The controlling power would demand no sacrifices which could

not be ethically justified, and no individual would resist the enforcement of a control which he could see to be wise and proper.

It scarcely need be said that such a subordination of the individual to society as this has no essential points of resemblance to that subjection of the individual to the welfare of its species which is implied in the biologic laws of "struggle for existence" and "survival of the fittest." The sacrifice demanded by these laws is ruthless, largely indiscriminate, and wholly selfish. So far as the process can be termed teleological, its sole aim is the improvement of the species, and the means employed one which contains no asking or possible granting of consent on the part of the individual victims. According to its principles the absolute annulment of every right of an indefinite number of individuals is justified if only the ultimate preservation of the species be promoted. According to the transcendentalist principle not the smallest demand may rightfully be made of a single person if this be the manner of, and the sole motive for, making it.

Nor can the subordination of the welfare of the individual to that of the species which is seen in the evolutionary process be defended upon a basis of utilitarian ethics. If, as Mr. Spencer and his school hold, utility be the determining criterion of rightfulness, then a sense of moral obligation cannot be conceived to exist except when the individual to be obligated himself recognizes the utility of the act demanded. If then, in any instance, the individual

should assert, as indeed almost all individuals, if questioned, would assert, that he considers the welfare of future generations of less value to him than his own welfare or life, we cannot demand that such a one should feel morally obligated to obey the given behest. In case of refusal it might, upon utilitarian grounds, be justifiable for society at large to coerce him, but it could not judge him morally recalcitrant, nor could the victim feel otherwise than oppressed. Inasmuch, therefore, as in the unrestricted struggle for existence it is the nine-tenths that are submerged in order that the one-tenth shall survive, the evolutionary system must, upon utilitarian grounds, be oppressive and irrational to the great majority of the individuals affected by it.

This is precisely the point seized upon by Benjamin Kidd in his book, *Social Evolution*. Building in the main upon Spencerian premises, Kidd declares that when that process of development which is helplessly and unthinkingly submitted to by the brute creation is examined in the light of men's reason, it is seen to be, as to the majority of individuals, an essentially irrational one. The reason why men have not long ago sought to end this destructive competition has been due, he declares, to the fact that religion has supplied super-rational or irrational sanctions to sustain social subordination. There are inherent defects in Mr. Kidd's argument, both as to the rational, or rather the irrational, character of all religious beliefs, and as to that absolute hostility of the interests of the individual to those of society which he states

in the broadest manner possible. Of these we will speak later. But certainly Mr. Kidd's theory that, from the standpoint of the individual, the simple biologic process of evolution cannot be defended upon utilitarian grounds, is correct.

As regards the third implied assumption of Mr. Spencer, that an unrestricted struggle for existence is as beneficent among human races as among sub-human species, the objections that may be urged are so numerous as to render difficult their treatment within the compass of a single chapter. The gist of them all is, however, contained in the two following statements of fact: First, that it is the general desire, as well as the true duty, of man not simply to live, but to live well. Second, that man as a rational being has the ability to modify his relation to his environment, either by consciously adapting his manner of life to it, or by altering its conditions.

The first truth has been well stated by President Schurman in a review of Mr. Spencer's *Justice* in the *Philosophical Review*. "The receipt," says President Schurman, "of the natural consequences of an individual's nature, active or quiescent, wherein Mr. Spencer discovers the essence of justice, seems to me to be neither just nor unjust, neither right nor wrong, neither moral nor immoral. No doubt this process has made the later generations of animals stronger, more cunning, and better adapted to the environment than the earlier generations. And were we aiming at a similar improvement in the breed of man, we

might perhaps not be able to do better than let the process of natural selection go on undisturbed. In that case we should have no charities for the poor, no hospitals for the sick, no protection for the weak and helpless. If the goal be the superiority of future generations, let the least forward varieties be eliminated. But there is no reason or excuse for such consequences when it is recognized that the conception of human welfare as ethical end implies, first of all, the well-being of existing humanity, each member of which is to be treated as an end in himself, never as a mere means to other ends, and then, secondarily, the welfare of future humanity—but only in so far as is compatible with the just claims of every living child of man. Mr. Spencer's moralization of natural selection is not demanded by an ethical system which places the supreme end in the welfare of the species, nor is it in itself inherently defensible. In the contention that the biological law 'possesses the highest possible authority,' because it records the process followed in the maintenance and evolution of life, it must be replied that even if this circumstance invested it with 'authority,'—as it does not,—natural selection, when it reaches the plane of rational life, is subordinated to the higher principle of human sympathy and sociality, which is the tap-root alike of morality and of the organized community in which it is realized. Ethics, accordingly, carries us into a sphere—not merely of living, but of living well—in which the biological formula is without application."<sup>1</sup>

<sup>1</sup> Vol. I, No. 1.

In other words, with the advent of rational, self-conscious, moral man, the aims of life are so changed as to render inappropriate that process of development which is efficient in the lower animal world. With self-consciousness comes the appreciation on the part of the individual of the possibility of a personal perfection, the formation in idea of a happier and better life than a mere animal existence. Whether the formation of such an ideal be the result of a divine afflatus or the effect of race experience, its existence is undeniable.

In the light, then, of this new conception, the term "fit for survival" assumes a new significance. Fitness now means ethical fitness. As has been said by another of Mr. Spencer's critics, social progress thus becomes a progress "the end of which is not the survival of those who may happen to be the fittest in respect of the whole of the conditions which obtain, but of those who are ethically the best."<sup>1</sup> When, now, to this ethical element, contributed by self-consciousness, we add the cognitive factor of reason, which suggests the possibility, as well as the means, by which man may take active steps to realize his new desires, we render almost self-evident the principle that should govern both individual and social action. This is, in short, that the slower and more expensive method of structural development by means of the biologic law should be supplanted by a process devised by the intellect of man, in which the operation of the former law is checked where

<sup>1</sup> Huxley, *Evolution and Ethics*.

it is seen to lead to evil or to entail an unnecessary amount of waste and suffering.

Professor Huxley in the address from which we have already quoted has elaborated this principle with great clearness. "Men in society," he says, "are undoubtedly subject to the cosmic process. As among other animals, multiplication goes on without cessation, and involves severe competition for the means of support. The struggle for existence tends to eliminate those less fitted to adapt themselves to the circumstances of their existence; the strongest, the most self-assertive, tend to break down the weaker. But the influence of the cosmic process on the evolution of society is the greater the more rudimentary its civilization. Social progress means a checking of the cosmic process at every step and the substitution for it of another, which may be called the ethical process; the end of which is not the survival of those who may happen to be the fittest, in respect of the whole of the conditions which obtain, but of those who are ethically the best." And he continues: "The practice of that which is ethically best—what we call goodness or virtue—involves a course of conduct which *in all respects* is opposed to that which leads to success in the cosmic struggle for existence. In place of ruthless self-assertion it demands self-restraint; in place of thrusting aside or treading down all competitors, it requires that the individual shall not merely respect but shall help his fellows; its influence is directed not so much to the survival of the fittest as to the fitting of as many as

possible to survive. . . . Laws and moral precepts are directed to the end of curbing the cosmic process and reminding the individual of his duty to the community, to the protection and influence of which he owes, if not existence itself, at least the life of something better than a brutal savage."

While the main conclusions reached by Huxley in his Romanes address have received very general acceptance, two more or less technical criticisms have been made upon his mode of stating them. It has been questioned, in the first place, whether he has not distinguished too sharply between the ethical and cosmic processes. In the quotations which we have made it is seen that apparently he makes the two processes mutually exclusive and antagonistic. But it may be asked, However much the ethical process may differ from the competitive process which prevails among the beings of lower creation, does not the former, as much as the latter, constitute a part of the general cosmic process; and does not, in truth, an adequate connotation of the term "cosmic process" comprehend all stages and methods of phenomenal development—a development which, however, may assume one form in the sub-human sphere and another in the human world?

Undoubtedly an affirmative answer must be given to this question, as no doubt Huxley himself would agree. In fact, though some of his expressions would point otherwise, we may in justice doubt whether he was in his address even temporarily led to think otherwise. It has been pointed out that Mr. Huxley

may have been consciously using, for the time being, the language of the unscientific, and the quotation from Seneca with which he prefaces his paper, *Soleo enim et in aliena castra transire, non tanquam transfuga sed tanquam explorator*, may indicate this.<sup>1</sup> Moreover, we have, in the *Prolegomena* which Mr. Huxley has prefixed to his address, the virtual admission of the point. In comparing the progress of plants under artificial and under natural selection, he says, "Thus it is not only true that the cosmic energy, working through man upon a portion of the plant world, opposes the same energy as it works throughout the state of nature, but a similar antagonism is everywhere manifest between the artificial and the natural." And in a note he adds: "Or, to put the case still more simply: When a man lays hold of the two ends of a piece of string and pulls them with intent to break it, the right arm is certainly exerted in antagonism to the left arm; yet both arms derive their energy from the same original source."

This is satisfactory so far as it goes, as admitting or showing that the processes of life and development which go on in the human and sub-human spheres constitute parts of one general cosmic scheme; but the implication is still left that the so-called ethical process is both essentially different from, and antagonistic to, that process which is displayed in the lower realms of life. And this leads to the second general question regarding Mr. Hux-

<sup>1</sup> By Miss White, *International Journal of Ethics*, Vol. V, p. 478.

ley's position. This is whether the ethical process does in fact have, either for its aim or its result, a cessation of the competitive principle; and whether, therefore, the ethical principle does in fact differ in kind from the evolutionary principles of "struggle for existence" and "survival of the fittest." In other words, cannot we take Mr. Huxley's homely example, and say that though, to be sure, the two arms in stretching the string do, in a certain sense, pull in opposite directions, yet their *modus operandi* is essentially the same and, what is more important, they both have the same aim in view, namely, the stretching or breaking of the twine?

Now, as all agree, the aim of all striving, whether animal or human, is life and development. The difference between the evolutionary process among men and among animals cannot, therefore, consist in the general end sought to be attained. What difference there is can only consist in the different sort of life or development striven for. This, indeed, is a very great difference, but is not one which would distinguish generically the two processes.

Professor John Dewey has called attention to the fact that there is no distinction *in kind* between those brute instincts which Mr. Huxley calls natural and those higher instincts which he calls moral.<sup>1</sup> The animal impulses and all natural impulses are not *per se* moral or immoral; they are the basis for all moral action, and whether moral or immoral depends upon how and for what purpose they are exercised.

<sup>1</sup> *Monist*, Vol. VIII, p. 32.

Thus both natural and social selection operate alike in so far as each implies adaptation to environment. The essential difference between the two processes consists, as has been before suggested, in the fact that what is unconscious with the brute is conscious with man, and that with this consciousness comes moral responsibility for the manner in which capacities are exercised, and the character of ends toward the attainment of which efforts are directed.

But, it may still be asked, do not the forms of development sought for by men differ so radically from those striven for by members of the lower living world as to necessitate methods that are essentially distinct? At first sight it would seem so, for, as we have already seen, one of the prime characteristics of the ethical régime is at once to put an end to many forms of competition which reign supreme in the realm of lower life. Yet, when we look at the matter closely, we find that in reality *that for which ethical man seeks is not necessarily to check the competitive process, but rather to fix, as criteria of fitness for survival, characteristics different from those established by purely biological laws.* The aim is thus not so much to check the stream of competitive energy as to direct it into different channels. The "struggle for existence" still remains, and through it development is secured, but the weapons used are changed, and the tests of superiority altered to meet the requirements of the new forms of development desired. This is a point which has been made very plain in the article by Professor Dewey from which

we have already quoted. Competition still persists, but it is no longer one simply for life, or based upon the mere physical, or lower intellectual, attributes. In the human world the struggle becomes one the conditions of which are moralized by the presence of sympathy, ideas of justice, and in general those ideals of personal perfection which man's developed mentality discloses to him. The bare struggle for existence, to be sure, still goes on to a very considerable extent among the lower wage-earning classes, and this, unfortunately, often approximates in severity, cruelty, and wastefulness the competition of the sub-human régime. But above these classes, as the higher stages of social life are reached, the competition is modified by the conditions of which we have spoken. And, even as to the lower classes, the effort of much modern legislation is, while not destroying competition, to raise its moral plane by the enactment of laws regulating the conditions under which, and the persons by whom, certain forms of more arduous and dangerous work shall be performed. This legislative effort is also supplemented by the endeavors of school and church—the one seeking so to develop the minds, the other so to stimulate and direct the motives and emotions, of the members of the lower classes that they may secure, through their own efforts, an amelioration and moralization of their life-conditions.

Even in those cases, however, in which the moralization of human efforts seems to necessitate a checking of the struggle for simple survival, a deeper

insight discloses that in many instances this is not the case. Struggle for existence means nothing more than a striving for adaptation to environment. It is thus possible to show that, even upon a purely utilitarian basis, many of our most common altruistic acts are socially self-serving; that, though they call for temporary sacrifices, they serve ultimately to excite emotions and to create habits which are socially beneficial. Thus, for example, Professor Dewey points out that in caring for the sick and helpless "we develop habits of foresight and forethought, powers of looking before and after, tendencies to husband our means, which ultimately make us the most skilful in warfare. We foster habits of group-loyalty, feelings of solidarity, which bind us together by such close ties that no social group which has not cultivated like feelings, through caring for all its members, will be able to withstand us. In a word, such conduct would pay in the struggle for existence as well as be morally commendable."<sup>1</sup>

Finally, upon this point, it is to be observed, as exhibiting from still another standpoint the essential similarity between social and animal methods of development, that these so-called altruistic elements which characterize human civilization are by no means absent from the sub-human world. Not to speak of that dependence of offspring upon parent which exists among almost, if not all, orders of life, there is, at least among the members of the higher animal species, an interdependence that often implies

<sup>1</sup> *Loc. cit.*

self-sacrifice, and leads to substantial coöperation. It may be that such actions are not due to conscious ethical motives, but they result at any rate in *de facto* altruism and coöperation. As Mr. Leslie Stephen has said: "It may be anthropomorphic to attribute any maternal emotions of the human kind to the animal. The bird, perhaps, sits upon her eggs because they give her an agreeable sensation, or if you please, from a blind instinct which somehow determines her to the practice. She does not look forward, we may suppose, to bringing up a family, or speculate upon the delights of domestic affection. I only say that as a fact she behaves in a way which is at once injurious to her own chances of individual survival and absolutely necessary to the survival of the species. The abnormal bird who deserts her nest escapes many dangers, but if all birds were devoid of the instinct, the bird would not survive a generation."<sup>1</sup>

This inclusion of the ethical within the cosmic process removes the last possible ground of support for that fear which Mr. Spencer expresses in his *Man versus the State*, that man in attempting to interfere with competitive laws is setting himself against august nature as *natura naturans*—that he is, in effect, pitting the microcosm against the macrocosm. The danger of this proceeding, he declares, is apparent in its very terms. Thus he says: "If the political meddler could be induced to contemplate the essential meaning of his plan, he would be paralyzed by

<sup>1</sup> *Social Rights and Duties*, I, p. 235.

the sense of his own temerity. He proposes to suspend in some way or degree that process by which all life has been evolved."

This fear of Mr. Spencer lest the cosmic forces be interfered with by man is one constantly reiterated by him. Yet does Mr. Spencer pretend to say that it is possible for man to defeat the operation of a natural or cosmic law? Or, if he does, where does he draw the line between purely natural or cosmic action and artificial action? If he would apply his censure to any effort on the part of man to escape from the operation of the competitive law, should he not, we may ask, extend his condemnation to any and all efforts of individuals of the brute creation to avoid danger and to bring themselves into better adjustment of their *milieu*? Does not, in fact, all life, human as well as animal, imply a struggle for adaptation to environment? Also, it may pertinently be asked, Why, if man is, as Mr. Spencer holds, able so potently to affect for evil the operation of natural forces, may he not, conceivably at least, be able to use his power for the accomplishment of good? Or are natural laws of such a peculiar character that, though modifiable, they are modifiable only for the worse?

As a matter of fact, when traced to its source, it is found that Mr. Spencer everywhere betrays in his writings what may be called a personal hostility toward governments. Though at times he speaks of government as subject in its life and development to cosmic evolutionary laws, he nevertheless, when

treating its other than pure police functions, uniformly considers it as something unnatural, artificial, existing apart from nature, as having interests necessarily different from, if not absolutely antagonistic to, those of its subjects, and as using them but as means for the realization of its own and necessarily evil ends. The attitude of mind of Mr. Spencer is of course explainable by the fact that in his study of past conditions, he has for the most part discovered governments controlled by oligarchies and administered selfishly in the interests of those in power. We reply, however, that though such conditions may serve to show why in the past evil results have so often followed governmental action, they have no power whatever to show that such will inevitably be the outcome in the future. Not only this, but we may without conceit declare ourselves freed from much of the ignorance under which our ancestors labored. Also we may point to the fact that no longer is political power in the hands of the minority, nor exercised in its behalf, but that in theory wholly, and in practice in large part, government by the people and for the people as a whole is a realized fact.

The criticism just made of Mr. Spencer's theories will serve as a basis upon which to make an estimate of the value of much of the reasoning of Mr. Kidd as contained in his *Social Evolution*. Like Spencer, Kidd accepts unreservedly the application of the purely biological laws of evolution to social man, and, as a necessary consequence, condemns as ill

advised all efforts directed to the checking of their operation.<sup>1</sup> Upon this ground he conceives socialistic schemes fundamentally defective, and recommends in their stead all forms of social or political action which will in any way remove present hindrances upon competition. He is optimistic enough to believe that the present trend, of Western civilization at least, is in this direction. In his closing pages he says: "The central fact working itself out in our midst is one which is ever tending to bring about, for the first time in the history of the race, all the people into competition of life on a footing of equality of opportunity. In this process the problem with which society and legislators will be concerned for long into the future will be how to secure to the fullest degree those conditions of equality,

<sup>1</sup> Mr. Kidd's views in this respect are rendered still more radical by the fact that he accepts the views of Weismann and his school that "acquired characteristics" are not inherited. The effect of this is, of course, to throw the entire burden of progress upon natural selection as secured by the competitive process. He is thus necessarily led to declare that progress will be the most swift where the number of men born into the world is greatest in excess of the means of possible subsistence, for under such circumstances the competition will be the keenest, the weeding out of the inefficient most rapid, and the selection of the fit most exact. It is a perfectly obvious fact, however, that history shows this not to have been the result among men. This incongruity of fact and theory should alone have been sufficient to warn Kidd that his premises needed revising. In this connection, also, we might call attention to the fact, excellently brought out by Mallock in his *Aristocracy and Evolution*, that very much of the competition that has existed among men has been between employers rather than the employed, and has thus been a struggle not so much for subsistence as for dominion and other satisfactions. Upon this point see also a review of Kidd's work by Theodore Roosevelt in the *North American Review* for July, 1895.

while at the same time retaining that degree of inequality which must result from offering prizes sufficiently attractive to keep up within the community that stress and exertion without which no people can long continue in a high state of efficiency."

There is much truth and value in what Kidd has shown us; and to the doctrine contained in the quotation which we have just made there can scarcely be given anything but praise. For, as we have seen, the result of our own inquiries has been to show, not only the necessity for, but the actual persistence of, competition among men even in the highest social states. The pity is, then, that in the body of his work Kidd, like his teacher Spencer, should nowhere have properly characterized, or apparently comprehended, what should be the true character of this competition, but should have interpreted it as practically equivalent to that mere struggle for life and subsistence which characterizes the sub-human sphere. It is furthermore unfortunate that he should have largely covered over what value otherwise belonged to his work by a conception of religion and of its social value almost wholly erroneous, and have emphasized this error by an attempted historical analysis of the progress of Western civilization which, aside from the errors arising from the false premises regarding the character and influence of religious beliefs, displays a frequent ignorance or omission of important facts.

The work is injured also by the assertion, obviously untrue in fact and unnecessary indeed to his own

thesis, of an unavoidable and complete opposition between the interests of the individual and of the society of which he is a member. Thus in one place he says, "The interests of the social organism and those of the individuals composing it at any time are actually antagonistic; they can never be reconciled, they are inherently and essentially irreconcilable." In justice to Kidd it should be said that he elsewhere qualifies the above statement to the extent of implying that some individuals may have an interest in the social welfare. This, while convicting him of inconsistency, relieves him at any rate of absurdity.

Let us stop for a moment, however, to see what is meant by the declaration that the interests of even a majority of the individuals of the present day are necessarily antagonistic to those of the society which they constitute. This, even in its qualified form, is a most serious and startling assertion. The general argument of Kidd shows that he means by this declaration that all individuals are by nature selfish; that, rationally, they conceive, or should conceive, their highest welfare to consist in material self-satisfaction; and that consequently the welfare of future generations cannot possibly enter as a reasonable factor into the determination of their conduct or ideals. To the statement of this ethical principle is joined the assertion that race or social progress is possible only through a competitive process which involves misery and destruction to a great majority of the participating individuals. From these two assertions the principle is deduced that, were the

men of the present day to act from purely rational motives, they would put a stop to this competitive struggle by the institution of some sort of socialistic scheme which would benefit themselves, but which would at once put an end to social progress ; and would, in fact, inaugurate a process of degeneration. This would, of course, mean that future generations would suffer from such a policy, but those now living would realize a higher degree, or at least a greater amount, of comfort and pleasure than would otherwise fall to their lot.

The bald utilitarianism and the consequent irrationality of all pure forms of altruism which Kidd maintains we cannot stop to criticise. To some extent what has already been said in the argument which has gone before will serve the purpose. But admitting for the nonce that self-interest in its strictest sense should rule, is it true that individual and race interests are antagonistic and irreconcilable ?

If Kidd had merely said that, as at present organized and operated, our social system is one in which race progress is secured at the expense of individual welfare, that would have been a simple statement of fact, to answer which it would merely be necessary thoroughly to examine existing social conditions, and from such an examination to determine, if possible, whether or not this were so. But this is not what is declared. In *Social Evolution* the assertion is made, and declared to have been demonstrated, that the two interests, race and individual, are inherently irreconcilable ; that, in other words, it is impossible,

under any conceivable social régime, to secure at once race progress and general individual success.

The demonstration of the incorrectness of this assertion depends directly upon the same reasoning which we have applied to the theories of Spencer. The source of the error of Kidd lies in his failure to comprehend the full possibilities of the competitive principle. To him, filled as his mind is with the laws of mere physical life, competition seems to mean little more than a struggle for sustenance and bare existence. We are in hearty accord with Kidd as to the general beneficence among men of a régime in which merit and success are determined by a fair and free contest, and we confess our inability to conceive of any other distributive method that would be of equal social efficiency, either for stimulating the development of desirable characteristics, or for bringing into the fullest and most effective operation those abilities which already exist; but we differ from him in that we hold that men are so endowed intellectually and emotionally as to render it at least conceivably possible for them so to conduct their competitive efforts as to secure at once the progressive improvement of their race and a life of relative prosperity and happiness for themselves. In other words, contrary to Kidd, we believe that, whatever may be our present state, we are not shut off from conceiving a possible one in which, while admitting to the fullest the competitive principle, social methods will be so perfected that through a wider diffusion of knowledge, a better adjustment of relations between employer

and employed, a more enlightened sense of moral responsibility, and a more nearly perfect organization of industry generally, not only will the means be given to each individual to make known the capabilities, manual or intellectual, which he possesses, but the opportunity afforded for exercising those talents in a manner both remunerative to himself and useful to society at large. Thus, through the employment of forces at their maximum degrees of efficiency and through the diminution of waste now due to enforced idleness and misdirected efforts, it may be hoped that the aggregate economic product will be greatly increased, and at the same time that the conditions which we have mentioned above will secure its distribution according to correct principles of justice. Under such circumstances we believe that future social progress would be possible, and at the same time a régime maintained which would be rational and beneficent to the individuals affected by it.

What we have thus far said has been in answer to the thesis of Kidd that individual and race interest are necessarily, and therefore forever, irreconcilable. As a matter of fact, however, we hold, as do of course the great majority of thinking men, that our social system, even as it is at present constituted and conducted, possesses a present utilitarian rationality to the great majority of individuals. At the same time we admit that there are some as to whom this assertion does not hold true. When, for example, we have able-bodied men or women seeking work

earnestly and unable to find it, or individuals deprived of such means of education as are fairly needed to bring to light abilities possessed, or individuals endowed with peculiar talents in particular directions and unable to obtain opportunity for their application or development, it can scarcely be said that, as to such individuals, the existing social system is rationally justified.

In the formation of an estimate as to how many such unfortunate individuals there are in any given society, it may be argued that whether or not a condition be rational to an individual upon a utilitarian basis must necessarily be left to the determination of that individual. His idea of pleasure or success, it may be said, may differ from our own, but as long as the conditions by which he is surrounded meet his own tests we cannot say that he is a victim to the social or political system that is maintained by his race.

If such an argument be raised, it is at once seen, however, that it will serve to justify, in this respect at least, some of the very worst civilizations. In fact, the lower the state of civilization, the easier and more complete would the justification be, for it would be exactly under those conditions that the individuals would be so ignorant and brutal that they would have neither the ability nor disposition to reason intelligently regarding their best interest. It is therefore a sufficient answer to this plea to say that the conditions under which such individuals have lived have never been such as to present a

possibility for the formation of truer and higher ideals of happiness and personal welfare.

To this it may be rejoined that this still implies that the one passing the judgment upon a society determines its rationality according to a standard which he himself sets up, and not according to one erected by the individuals themselves. This is true, and must necessarily be so. In the formation of any judgment whatever, a critic must have established for himself an ideal or standard, in comparison with which the facts under consideration are judged and, by their conformity or nonconformity to it, justified or condemned. In this sense every estimate of value, moral, economical, or political, is necessarily subjective. But it is not subjective in so far as the one by whom it is formed or stated eliminates from it all elements of personal bias or peculiarity. Thus, to take the example we have mentioned, if the critic has no regard for what he, individually, with his own personal peculiarities, most desires, but considers solely what form of welfare, looked at from the highest ethical standpoint, would be most suitable to the individuals concerned, and which would indeed be most acceptable to them were they properly informed, an objective opinion is given.

From the utilitarian standpoint, then, there are two standpoints from which any given society may be declared to be irrationally organized or directed. It may either be alleged that it fails to provide for a possible happiness of a considerable number of its individual members, according to the standard which

they set up; or it may be claimed that, though it may provide a possible happiness to all according to their own standards, it yet fails to provide that intellectual and ethical development which is necessary to secure the formation of better ideals. It is easily possible for a given social régime to be held delinquent upon either or both of these counts.

It will be noticed that care has been taken in the foregoing to make use of the phrase "possible happiness." The propriety of this is obvious. A social régime cannot be held responsible for unhappiness due to the wilful misconduct of a sufferer, as, for example, where one, either by failing to make use of the opportunities fairly presented to him, or by deliberately selecting the more evil of two courses or refusing to sacrifice a present pleasure for a greater good, has brought harm upon himself. In passing judgment upon the rationality of a régime as to its effects upon individuals, the question is thus not as to what number of individuals are unsuccessful and miserable, but as to what number are so because of the existence of that régime. Where failures are due to personal faults or failings, and not to circumstances over which the individuals have no control, there is reaped only that which has been sown, and social conditions cannot be indicted for the result.

What has been said regarding the necessity of framing a social ideal before it is possible to pass a judgment upon any given régime implies two facts which Kidd and many others seem not to recognize, or at least to state. These are, first, that happiness,

prosperity, welfare, success, or whatever similar terms may be used, are not of absolute value, but relative to a standard of conceived perfection ; and, secondly, that, in a strict sense, no condition of affairs which is subject to human direction is absolutely rational unless ideally perfect. In this strict sense, therefore, in so far as any régime falls short of perfection, its continued maintenance is irrational.

In the light of the first fact the great majority of the participants in any general contest must necessarily fail. If success be judged by the achievements of the one or few most successful, the entire remainder fail. Indeed, in many cases it may even be held that all have failed, inasmuch as the most successful may have fallen far short of that which was not only desirable, but possible of attainment. But—and here is the point—this by no means proves that as to the whole, or even as to the less successful portion of the people, the contest has been a failure. There is still a possibility that all, or nearly all, have received benefit from the struggle, though, to be sure, some have been relatively more rewarded than their fellows. For those who believe as fully as does Kidd in the efficiency of the competitive régime in stimulating the energies and properly directing the efforts of individuals, the presumption is, in fact, that such will be the case under any individualistic scheme of social organization.

Applying now the second fact of which we have spoken above, we may ask what is the proper meaning of the question, “Is a given social régime ration-

ally justified?" Strictly speaking no completely rational social régime has ever existed, nor will such a one exist until that form of organization and manner of administration is effected under which not only race progress at the most rapid possible rate is secured, but complete opportunity afforded to every individual member to render effective every capability which he possesses, and to develop every power potentially possessed, and, finally, under which is guaranteed to all the just results accruing from their several activities. When, then, it is said by Kidd that present social conditions are without a rational basis, he is right in the sense that they are not all that they should be. But this, as we have seen, is not the comparison which Kidd makes. His assertion is that past and present social régimes, so far as they are competitive, are irrational when viewed from the individualistic standpoint; and, so far as non-competitive, irrational when viewed from the social standpoint. He thus excludes the possibility of a régime rational from both standpoints. He is, therefore, unable to conceive of an absolutely ideal state, though, as between the two, he prefers that absolutely competitive state in which the progress of the race is best secured.

For the sake of clearness, we will state again our position. We agree with Kidd in believing that the absolutely competitive state is the ideal one; but we disagree with him as to the impossibility of securing general individual welfare thereunder. When we speak of the ideal goal of human progress necessitat-

ing the establishment of an absolutely competitive régime, we qualify this by adding the condition that competition is to be maintained only upon the very highest planes. The régime must be one in which, as has been already implied, the *criteria* of fitness for success or survival will be the possession of absolutely the highest moral qualities. This naturally implies the disappearance of all the lower and more brutalizing forms of strife, and with them the avoidance of all the unnecessary forms of suffering to which they give rise. It means that no one shall find himself born into a social world in which he is to any degree so bound by social requirements or so hindered by the intricacy of the economic machinery, in the management of which he constitutes but an insignificant agent, that he is unable to develop to the fullest his capacities, to educate to the fullest his desires, and to reap to the fullest the rewards of his individual merit. Thus interpreted, it needs no imaginative development to show that in a society so organized there would need be no sacrifice of the welfare of individuals, either present or to come. Thus, as a result of his long course of reasoning, we are finally brought to sustain the thesis of Mr. Spencer which we originally criticised, namely, "that the interests of humanity are to be best subserved by giving full effect to the law that each individual shall receive the benefits and evils of his own nature and its consequent conduct." It is only in the interpretation of this rule that we have differed widely from that philosopher.

It is especially in the bearing of the rule upon the question of the legitimate extent of social control that we are at variance with him. To us its recognition as a principle would carry with it no necessary demand for a diminution in the functions of government. Its recognition would, to be sure, imply a change in character and motive of many of the State's present activities, but would not necessarily decrease their aggregate amount. It would involve the disappearance of many forms of industrial interference that now exist, and the abandonment of all of the cruder forms of state socialism. But it would permit a vast extension of the present regulative and educational functions of the governing powers. The State's regulative powers could be made to embrace all those functions which are necessary: first, to prevent the limitation of the freedom of individuals, such as is sometimes attempted by such organized bodies as churches, labor unions, political societies, and industrial combinations; and, secondly, to secure competition along the highest lines, by providing that certain forms of work shall be carried on under prescribed conditions, as regards, for instance, hours of work, employment of women and children, and maintenance of hygienic conditions.

The educational functions of the State could in like manner be subjected to almost indefinite extension. They could be made to include, not only the collection and dissemination of every variety of information, statistical or otherwise, which could be of possible value to the people, but could also properly

be made to embrace the more directly pedagogic task of providing for the freest and most adequate instruction in all forms of human knowledge, practical and speculative.

Such activities as the above would not necessarily be anti-competitive or socialistic in character. In my book *The Nature of the State*, after dividing the functions of the State into essential and non-essential duties (meaning by non-essential, all those activities assumed by the State, not because their exercise is a *sine qua non* of the State's existence, but because their public administration is supposed to be advantageous to the people), I called attention to the fact that this latter class is separable into two divisions which may properly be termed socialistic and non-socialistic. The socialistic duties properly comprehend only activities which can and will be exercised by the people if left to their private initiative. Their assumption is, therefore, to that extent, a curtailment of industrial freedom of the people. The non-socialistic duties include those which, if not assumed by the State, either cannot or will not be exercised at all. As I said in the work to which I have referred: "They are duties not essential to the State's existence, and yet, from their very nature, not likely or even possible of performance by private parties. Such duties as these are, therefore, not socialistic, because their public assumption does not limit the field of private enterprise, nor in any way interfere with private management of any sort of industry. As a rule they are powers educational in character rather than

coercive, directive rather than controlling. Under this head come all those administrative duties that are of an investigating, statistical character, and consist, not in the interference with industry, but in the study of conditions and the diffusion of the information thus obtained. Work of this kind is that performed by the United States Departments of Labor and Agriculture, by the Bureau of Education, the Fish Commission, the Coast and Geodetic Survey, by the Census Bureau, etc. Public libraries and reading rooms, boards of health, the provision of public parks, and certain branches of education also come under this head. Their purpose is not to interfere with the struggle for existence and the survival of the fittest, but to transform the environment, and, by diffusing sounder information concerning the character of the conditions and the nature of the forces by which man is surrounded, to render it possible for him either to harmonize his efforts with them or to direct his strength and intelligence to a modification of them; in fine, to increase his opportunities.”<sup>1</sup>

But even the ownership and direct operation of industrial concerns by the State are not necessarily excluded by the adoption of the competitive principle. As long as it appears that a given industry, if left in private hands, will almost inevitably be subjected to the control of some one or few commercial “trusts,” whereby true or healthy competition is rendered impossible, the assumption by the State of its management will at least not lessen competition; while,

<sup>1</sup> *The Nature of the State*, pp. 347-348.

on the other hand, it will secure to the people generally the benefits flowing from the monopoly. This control cannot, however, consistently with the competitive principle, be applied so long as there is a possibility of devising effective means for so controlling the organization and operation of monopolies that a healthy competition may be obtained.

In the second place, aside from the qualifications of the above, state operation of an industry may be justified upon the competitive principle if by so doing the industry is managed in such a way that a greater degree of true competition will be maintained between the individuals employed than would be the case under private management. This we consider a very important point, though not one which we remember to have seen often urged. From the social standpoint it is much more desirable that there should be healthy competition between employees than that there should be a contest between industrial concerns. It is one of the chief evils of the present industrial régime of production on a large scale that the chief competition that exists is between working men and women in securing employment. Positions once secured, competition largely ceases. The employees become merged in a large body of workers, and have little direct personal interest in the work which they perform. Even in those private industries in which the wages paid are proportionate to the amount of work done, the individual is not permitted, as a rule, to exhibit his full degree of skill. In many cases it is an unwritten law among such workmen that cer-

tain maxima of piece work shall not be exceeded, even by the most able and skilful, for the very satisfactory reason that if such maxima are more than occasionally exceeded the price paid per piece by the employers will inevitably be reduced, with the result, of course, that the most efficient will henceforth receive no more than they would have earned under the old scale, while all the remainder will receive less.

If, then, we can have a governmental control in which earnings are graded according to the amount and character of work done, and in which a careful inspection is maintained for the purpose of detecting with reasonable certainty the presence of merit or demerit in all their degrees, and of rewarding them proportionately, either by increase or decrease of wages, or by changing the character of work required, then a truer and more beneficial competition will be maintained than the old competition between concerns which the governmental monopoly will destroy. We are not, however, to be considered as maintaining that any such beneficent governmental management will be likely to result from public control, political morality and intelligence being what they now are. We should, in fact, expect the reverse. All that we wish to point out is that the application of the competitive principle would not necessarily, that is, under all conceivable conditions, exclude such governmental ownership and operation.

By way of summarization of the points of difference between the conclusions to which we have been led by

the adoption of the competitive principle as an ideal one, and those reached by Mr. Spencer in applying the same principle, we may say: First, that, instead of leaving individuals to conduct their contests in their own way, unrestrained by social control, we would justify all actions of the State which will tend to raise the ethical plane of competition. Secondly, we would justify state intervention where such intervention is for the purpose of preventing oppression of individuals by each other. Thirdly, we would justify such intervention where, without it, monopolies or trusts would be organized under private management. Fourthly, we would justify state action where its influence is educative, or where it is limited to the performance of some duty which otherwise would not be performed at all. Fifthly, we would justify state action where, although its effect is to put an end to certain forms of competition, its result is the stimulation and maintenance of better forms of rivalry.

It is now necessary to answer one final question. It may be asked whether these kinds of governmental intervention which we have justified do not rest for their justification upon the implication of a certain amount of ignorance or viciousness on the part of the people, and whether, therefore, it is not true that as civilization advances the necessity for this intervention will decrease, until finally, when the final goal of human progress is reached, the need for political control will have entirely disappeared. If we answer yes to this, we in effect affirm that, though the anarchistic state be not now

desirable, it yet stands as an ideal continually to be striven for and, possibly, ultimately to be realized.

This proposition has been and still is widely held. Spencer in his *Social Statics* says: "It is a mistake to assume that government must necessarily last forever. The institution marks a certain stage of civilization—is natural to a peculiar phase of human development. It is not essential, but incidental. As amongst Bushmen we find a state antecedent to government, so there may be one in which it shall become extinct."<sup>1</sup> And again he says: "Does it [government] not exist because crime exists? . . . Is there not more liberty, that is, less government, as crime diminishes? And must not government cease when crime ceases, for the very lack of objects on which to perform its function? Not only does magisterial power exist because of evil, but it exists by evil."<sup>2</sup>

Janet takes the same view in his *Histoire de la Science politique*: "Imaginez [he says] en effet une politique parfaite, un gouvernement parfait, des lois parfaites, vous supposez par là même des hommes parfaits. Mais alors la politique ne serait plus autre chose que le gouvernement libre de chaque homme par soi-même: en d'autres termes, elle cesserait d'être. Et cependant, c'est là sa fin et son idéal. L'objet du gouvernement est de préparer insensiblement les hommes à cet état parfait de société, où les lois et le gouvernement lui-même deviendraient inutiles."<sup>3</sup>

Hume, too, in his essay, *Of the Original Contract*, says, "Were all men possessed of so inflexible a

<sup>1</sup> Edition 1873, p. 24.

<sup>2</sup> *Idem*, p. 230.

<sup>3</sup> Vol. I, p. ci.

regard to justice that of themselves they would totally abstain from the properties of others, they had forever remained in a state of absolute liberty, without subjection to any magistrate or political society." The assertion of Jules Simon, that "the State ought to render itself useless and prepare for its own decease," indicates the same view. So also we find the late Professor Freeman asserting: "As for discussions about any one ideal form of government, they are simply idle. The ideal form of government is no government at all. The existence of government in any shape is a sign of man's imperfection."<sup>1</sup> And, finally, to similar effect is the declaration of Paine in his *Common Sense*, that "government, like dress, is the badge of lost innocence."

What degree of truth is there in this conception of anarchism or no-government as an ideal? In one sense there is a good deal; in another, none. If by anarchism reference is had to the absence of all coercion, the conception is a valid one. If, however, the idea is that all forms of public activities shall disappear, it is invalid. As we have elsewhere pointed out, all coercion is in itself painful, and therefore an evil. An ideal social order must, therefore, be one in which the element of coercion is to play no part. On the other hand, as we have also pointed out, in so far as political laws or social conventions are recognized as just by those whose actions are to be controlled, no feeling of coercion is experienced. The absence of coercion which is ideally

<sup>1</sup> *Historical Essays*, Fourth Series.

demanded does not, therefore, necessarily imply the disappearance of all forms of public activities and regulations. In fact, were all men morally perfect and intellectually enlightened, public activities would in all probability be very widely extended. For with men so perfect morally and intellectually, there would be no difficulty either in establishing or operating an administrative machine with any number of functions. Controlled by such wise and upright men, the economies in production that would follow from the establishment of such a control would be obvious, and at the same time the necessary competitive struggle between individual workers could be maintained—if, indeed, any competition would be needed to stimulate the energies and to weed out the unfit in a race already, *ex hypothesi*, so nearly perfect.

It is true, however, that should such a state of development ever be attained, many of what are now among the most important of the functions of the State would fall into disuse. The exercise of all the punitive and, to a large extent, the educational activities of the political authorities would become unnecessary. Legislation would be needed, not so much for the purpose of applying coercion, as for the sake of providing such uniform rules as convenience would dictate. Civil as well as criminal litigation would conceivably cease. Only the administrative duties of the State would remain. These would probably be increased so as to include the performance by the State of every possible service that could, from the nature of the case, be better

performed by a single agent than by the several efforts, however harmonious, of private individuals.

By way of conclusion of this long inquiry, then, it may be stated that we have reached a position which sustains that portion of the theory of the socialist which justifies the extension of state activities in any conceivable direction where it can be shown that, as a matter of fact, political control will be followed by beneficent results. At the same time, this does not commit us to the advocacy of social control in any given case. An estimate of all the considerations involved may indeed easily lead us to advise the reduction of state duties to a minimum below that now practised in any of our civilized States. In truth, so far as the reasoning that has gone before is concerned, the tendency has been to emphasize the possibilities, both for race and individual progress, that are wrapt up in the competitive principle.

## CHAPTER X

### PUNITIVE JUSTICE

THUS far in our work we have been examining canons of justice as applicable to the distribution of rewards. We turn now to the questions of right involved in the apportionment of penalties or punishments.

**Of the Distinction between Corrective and Distributive Justice.** — Since Aristotle's time it has been common to distinguish between distributive and corrective justice. In his *Nicomachean Ethics* the Stagirite says:<sup>1</sup> "Of particular justice, and of the particular just which is according to it, one species is that which is concerned in the distribution of honor, or of wealth, or of any of those things which can possibly be distributed among the members of a political community, for in these cases it is possible that one person, as compared with another, should have an unequal or an equal share; the other is that which is corrective in transactions between man and man. And of these there are two divisions, for some transactions are voluntary [*i.e.* we take it, voluntary as to both or all parties concerned] and others involuntary [as to one of the parties]; the voluntary are such as follow: selling, buying,

<sup>1</sup> Book V, Chapter II, Bohn's edition.

lending, pledging transactions, borrowing, depositing of trusts, hiring ; and they are so called because the origin of such transactions is voluntary. Of involuntary transactions, some are secret, as theft, adultery, poisoning, pandering, enticing away of slaves, assassination, false witness ; others accompanied with violence, as assault, imprisonment, death, robbery, mutilation, evil-speaking, contumelious language.” In the next chapter, speaking of distributive justice, Aristotle says, “If the persons are unequal, they will not have equal things. . . . This is clear from the expression ‘according to worth’ ; for in distributions all agree that justice ought to be according to some standard of worth, yet all do not make that standard the same ; for those who are inclined to democracy consider liberty as the standard ; those who are inclined to oligarchy, wealth ; others, nobility of birth ; and those who are inclined to aristocracy, virtue. Justice is therefore something proportionate.” In Chapter IV, speaking of corrective justice, he says : “But the other one [form of justice] is the corrective, and its province is all transactions, as well voluntary as involuntary. But this justice has a different form from the preceding ; for that which is distributive of common property is always according to the proportion before mentioned. For if the distribution be of common property, it will be made according to the proportion which the original contributions bear to each other ; and the unjust which is opposed to this just is contrary to the proportionate. But the just which exists in transactions is

something equal, and the unjust is something unequal, but not according to geometrical but arithmetical proportion;<sup>1</sup> for it matters not whether a good man has robbed a bad man, or a bad man a good man, nor whether a good or a bad man has committed adultery; the law looks to the difference of the hurt alone, and treats the persons, if one commits and the other suffers injury, as equal, and also if one has done and the other suffered hurt. So the judge endeavors to make this unjust, which is unequal, equal; for when one man is struck and the other strikes, or even when one kills and the other dies, the suffering and the doing are divided into unequal parts; but then he endeavors by means of punishment to equalize them by taking somewhat away from the gain."

According to our views, the above distinction between corrective and distributive justice is not a proper one, all justice, from its very nature, being distributive. That is to say, justice is ever a matter of relative or respective desert as between two or more individuals, or between individuals and the societies of which they are members. Strictly speaking, therefore, the phrase "distributive justice," which we have so often employed, is redundant. We have, however, believed that a concession to popular speech in this respect would add clearness to our thought.

Aristotle's description, so far as it relates to that equality of consideration which suitors, irrespective

<sup>1</sup> For meaning of this distinction, see *Nicomachean Ethics*, Book V, Chapter III.

of their worths, may claim from the administrators of the law, is a correct one. In civil wrongs it is proper to say that the action of the law has for its essential purpose the securing as far as possible the *status quo ante*, that is, the putting of the parties into that position in which they would have been had the wrong not been committed. But, after all, in so doing the courts are not determining and applying principles of justice except in the formal legal sense. The principles of justice in their pure ethical meaning have been determined when the sense of the community in its customary law, or the legislature in its enacted statutes, has determined what rules shall be considered as just for the governance of men in their dealings with one another, and what actions shall be considered and treated as unjust and therefore wrong. This determined, the courts have but the formal task of determining the facts involved, and of applying the legal principles appropriate to them. Thus we find that corrective justice so-called, as applied to civil matters at least, is not justice at all, except in a formal sense. It is simply the vindication of legal rights, irrespective of whether, under the given circumstances, they are ethically valid or not. That they are recognized by the law is sufficient to make it incumbent upon the courts to nullify, so far as possible, any violation of them, and thus to bring about a condition of affairs which should, from the legal standpoint, never have been disturbed.

How is it with corrective justice as applied to matters of violence or crime? Here, as we have

seen, the implication of Aristotle is that the penalties which the law enacts are for the purposes of bringing about, so far as possible, a lost equilibrium. When property obtained by crime is restored to its owners, the *status quo ante* is, in a certain sense, re-established. But this is a matter distinct from the penalty which the law imposes upon one who has violated its ordinances. In crime such a thing as the reëstablishment of antecedent conditions is impossible. In some few cases it may be possible to visit upon the offender a violence similar to that of which he has himself been guilty, but there is no tendency in such a proceeding toward a reëstablishment of those conditions which have been destroyed by the act of the criminal. He has committed a violence, and violence has been committed upon him, but the latter violence does not blot out the former. Thus we see that as to acts of force or violence, corrective justice so called by Aristotle is not corrective in any true sense. The moral element has entered in the determination of what acts shall be considered as crimes; and, this determined, the decision as to what forms and degrees of punishment shall be applied to those committing them becomes a question of distributive justice.

**The Importance of Crime as a Social Phenomenon.** — Few subjects there are either in ethical or political science which approach in importance that of Crime. The cost to society of crime in all its degrees and phases is enormous. The figures of the federal census for 1890 showed nearly eighty thousand inmates

of our prisons and reformatories, and this number, following the estimate given us by experts that at any one time probably not one-third of the total number of criminals are in imprisonment, gave us then a total criminal population of two hundred and fifty thousand. To the loss arising from the destruction of life and property by the illegal acts of this vast army, must be added the expenses of preventing, detecting, and punishing crime. In the United States there are more than fifty large penitentiaries, and over seventeen thousand country jails, police stations, and city prisons. It is calculated that \$500,000,000 would be a low estimate of the cost of these buildings. This is of course all dead capital. At five per cent interest this sum would yield a yearly income of \$25,000,000. But even this waste sinks into insignificance when compared with the cost of supporting these institutions and our penal systems generally, including the maintenance of courts and police forces. At a recent International Congress of Criminal Anthropology it was stated that the amount of money now spent by society for the detection and punishment of crime amounts to over \$400,000,000 annually, an amount sufficient, if expended in a proper manner, to banish absolute want from amongst us. Mr. Boies in a comparatively recent work has declared that in 1890 the cost of the penal, reformatory, and charitable institutions of the state of Pennsylvania alone was equal to the burden of a bonded debt of \$275,000,000 bearing interest at four per cent.

Examining the theories which have been brought forward by ethicists in justification of punishment, we find that they may be described as: (1) Retributive, (2) Deterrent, (3) Preventive, and (4) Reformatory, respectively. In determining the value of these theories it will be necessary, as was the case in reference to the theories of justice as applied to the distribution of rewards, to consider them not only from the standpoint of abstract justice, but as to the possibility of realizing them in practice.

**The Retributive Theory.** — Beginning with the retributive, or as it may also be called, the vindictive, or expiative, theory, it is to be observed first of all that, in the strict sense of the word, only that pain may be spoken of as punishment which is imposed simply and solely for the sake of the pain to be felt by the one punished. According to the retributive theory, through punishment the offender expiates his offence, suffers retribution for the evil which has been done, and thus is vindicated the principle of justice which has been violated. Thus says Godwin, in his *Political Justice*, “Punishment is generally used to signify the voluntary infliction of evil upon a vicious being, not merely because the public good demands it, but because there is apprehended to be a certain fitness and propriety in the nature of things that render suffering abstractly, from the benefit to result, the suitable concomitant of vice.”<sup>1</sup>

Accepting this definition which Godwin gives us

<sup>1</sup> *Op. cit.*, p. 230.

as the true meaning of punishment, it is necessary to hold that, in so far as a penalty is imposed for any other than a vindictive object, as, for example, for the sake of deterrence, prevention, reformation, or social protection, it ceases to be punishment at all. For all of these other objects have a reference to some good that is to be secured in the future; whereas the retributive theory, by its very nature, looks wholly to the past. According to it, pain is inflicted, not in order that some advantage may accrue in the future, but because some wrong has been done in the past.

We have, then, to ascertain the circumstances, if any there be, under which it is ethically allowable for one not only to determine for another the propriety of his acts, but to visit upon such a one punishment in case he commits acts that have been declared *mala prohibita*.

The idea of retribution or expiation can apply only as between rational beings. It is true that Great Nature (*Natura Naturans*) is often spoken of as inflicting punishment and even as destroying those who violate her laws. But such language cannot be considered strictly correct. Indeed, the very idea of violating a law of nature is an improper one. The so-called laws of nature are but statements of uniformities of experience in the phenomenal world. As such they are not in any true sense commands, and are not possible of violation by men. Certain results, so far as our experience goes, are known to follow from certain causes. That is all. There is no law-

giver to be offended. There is not necessarily present any idea of wickedness, nor do the elements of intention and moral responsibility necessarily play a part when, as a consequence of a certain state of facts, certain results, disagreeable or otherwise, are experienced by particular individuals or communities. But in order that the retributive theory may have standing at all, these elements must appear. According to the theory, one is punished because he is supposed to have done a moral wrong, that is, to have committed not simply a formal or legal wrong, but to have sinned in the sight of the power that punishes him. But only that one can be said to have sinned who has freely committed the reprobated act, and who, furthermore, at the time of its commission has been mentally qualified to judge regarding the character of the act committed and, being so qualified, actually intended to commit it.

Having defined now what is meant by punishment in its proper retributive or expiative sense, we come to the vital question whether a true system of ethics requires, or even permits, the existence of a right to inflict pain for this purpose. In short, can there be stated any rational ground for declaring that justice demands, under any conceivable conditions, that pain should be inflicted when no possible future good can result? If we answer "No," we of course deny that the idea of punishment, in its proper sense, should play any part whatsoever in our systems of ethics.

Among English writers Godwin has perhaps most strongly asserted the invalidity, and in fact the

absolute cruelty, of the retributive view of punishment. After calling attention to the idea sometimes held that Nature herself teaches us that suffering should be annexed to vice, he continues: "Arguments of this sort must be listened to with great caution. It was by reasonings of a similar nature that our ancestors justified the practice of religious persecution. 'Heretics and unbelievers are the objects of God's indignation; it must therefore be meritorious in us to maltreat those whom God has cursed.' We know too little of the universe, are too liable to error respecting it, and see too small a portion of the whole, to entitle us to form our moral principles upon an imitation of what we conceive to be the course of nature." In truth, as Godwin says, the fact is that in general we call that vicious to which the laws of nature annex suffering, and thus the viciousness attaches because of the consequential pain, rather than *vice versa*. "Thus it appears, whether we enter philosophically into the principles of human actions, or merely analyze the ideas of rectitude and justice which have the universal consent of mankind, that, accurately speaking, there is no such thing as desert. It cannot be just that we should inflict suffering on any man, except so far as it tends to good. Hence it follows that the strict acceptation of the word 'punishment' by no means accords with any sound principles of reasoning. It is right that I should inflict suffering in any case where it can be clearly shown that such infliction will produce an overbalance of good. But this infliction

bears no reference to the mere innocence or guilt of the person upon whom it is made. An innocent man is the proper subject of it, if it tend to good. A guilty man is the proper subject of it under no other point of view. To punish him upon any other hypothesis for what is past and irrecoverable and for the consideration of that only, must be ranked among the wildest conceptions of untutored barbarism.”<sup>1</sup>

The remarkable declaration which Godwin makes, that, “accurately speaking, there is no such thing as desert,” requires some explanation. This assertion is based upon Godwin’s deterministic ethics, according to which freedom of the will and moral responsibility in the agent are flatly denied. On the page preceding that from which our quotation is taken he says, “The assassin cannot help the murder any more than the dagger [with which the deed is committed].”

If this be so, if the individual be the helpless prey of circumstances, then of course no such thing as ethical desert is possible. And if, as Godwin believes, the greatest happiness is the greatest good, no distribution either of rewards or penalties is justified except as it tends to advance the realization of that good.

That philosopher who, among modern writers, has defended most absolutely the retributive theory of punishment, is Kant. His views upon this point are to be found in his *Rechtslehre*.<sup>2</sup>

<sup>1</sup> *Political Justice*, Book VII, Chapter I.

<sup>2</sup> Translated by Hastie under the title *Philosophy of Law*.

“Judicial punishment,” says Kant, “can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed some crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of real right. Against such treatment his inborn personality has a right to protect him, even although he may be condemned to lose his civil personality. He must first be found guilty and punishable, before there can be any thought of drawing from his personality any benefit for himself or his fellow-citizens. The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarians to discover some advantage that may discharge him from the justice of punishment or even from the due measure of it according to the Pharisaic maxim: ‘It is better that one man should die than that the whole people should perish.’ For if Justice and Righteousness perish, human life would no longer have any value in the world. What, then, is to be said of such a proposal as to keep a criminal alive who has been condemned to death, on his being given to understand that if he agreed to certain dangerous experiments being performed upon him, he would be allowed to survive — if he come happily through them? It is argued that physicians might thus obtain new information that would be of

value to the commonweal. But a court of justice would repudiate with scorn any proposal of this kind if made to it by the medical faculty; for justice would cease to be justice, if it were bartered away for any consideration whatever.”<sup>1</sup>

Kant makes this repudiation of the utilitarian element still more emphatic, when he declares: “Even if a civil society resolved to dissolve itself with the consent of all its members,—as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world,—the last murderer living in prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participants in the murder as a public violation of Justice.”<sup>2</sup>

The vindictive theory is accepted by Kant not only as furnishing the motive for punishment, but as dictating the character of the penalty to be imposed in each case. The doctrine of *lex talionis* is to be applied without reservation. “This right,” he says, “is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a first penalty. All other standards are wavering and uncertain; and on account of other considerations involved in them, they contain

<sup>1</sup> *Op. cit.*, p. 195.

<sup>2</sup> *Idem*, p. 198.

no principle conformable to the sentence of pure and strict justice.”<sup>1</sup>

Let us see now what theoretical justification Kant offers for his theory. It is, in short, that the criminal by the deliberate commission of his deed has, in effect, accepted as valid the principle involved in the deed. Therefore, says Kant, if that same principle be applied by society to him, he is in reality but subjected to a rule of conduct which, by his own conduct, he has declared to be a valid one. Thus, in answer to the argument made by Beccaria against the rightfulness of capital punishment, that it cannot be conceived that in the original civil compact the individual could or would have consented thus to dispose of his own life, Kant replies: “No one undergoes punishment because he has willed to be punished, but because he has willed a punishable action; for it is, in fact, no punishment when one experiences what he wills; and it is impossible for any one to will to be punished. To say, ‘I will to be punished, if I murder any one,’ can mean nothing more than, ‘I submit myself along with all the other citizens to the laws’: and if there are any criminals among the people, these laws will include criminal laws. The individual who, as a co-legislator, enacts penal law, cannot possibly be the same person who, as a subject, is punished according to the law; for, *qua* criminal, he cannot possibly be regarded as having a voice in the legislation, the legislator being rationally viewed as just and

<sup>1</sup> *Op. cit.*, p. 196.

holy. If any one, then, enact a penal law against himself as a criminal, it must be the pure juridically law-giving reason (*homo noumenon*) which subjects him as one capable of crime, and consequently as another person (*homo phenomenon*), along with all the others in the civil union, to this penal law. In other words, it is not the people taken distributively, but the tribunal of public justice as distinct from the criminal, that prescribes capital punishment; and it is not to be viewed as if the social compact contained the promise of all the individuals to allow themselves to be punished, thus disposing of themselves and their lives. For if the right to punish must be founded upon a promise to the wrong-doer, whereby he is to be regarded as being willing to be punished, it ought also to be left to him to find himself deserving of the punishment; and the criminal would thus be his own judge. The chief error of this sophistry consists in regarding the judgment of the criminal himself, necessarily determined by his reason, that he is under obligation to undergo the loss of his life, as a judgment that must be founded on a resolution of his will to take it away himself; and thus the execution of the right in question is represented as united in one and the same person with the adjudication of the right.”<sup>1</sup>

<sup>1</sup> *Op. cit.*, pp. 201–202. Mr. F. N. Bradley, in his *Ethical Studies*, published in 1876, assumes very clearly the retributive theory of punishment. Thus he says (pp. 25–26): “We pay the penalty because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime,

What validity is there in this reasoning of Kant? Only this much, we think. It furnishes a satisfactory answer to that school of thinkers who, having not yet thoroughly rid themselves of the social-compact and natural-right theories, declare that all social or political control over the individual, needs, for its

and not what it pretends to be. We may have regard for whatever considerations we please,—our own convenience, the good of society, the benefit of the offender,—we are fools and worse, if we fail to do so. Having once the right to punish, we may modify the punishment according to the useful and the pleasant, but these are external to the matter; they can give us no right to punish, and nothing can do that but criminal desert.—Yes, in spite of sophistry, and in the face of sentimentalism, with well-nigh the whole body of our self-styled enlightenment against them, our people believe to this day that punishment is inflicted for the sake of punishment.” Writing nearly twenty years later, however, Mr. Bradley substantially modifies this view, though he does not admit it. In an article entitled *Some Remarks on Punishment*, contributed to the *International Journal of Ethics* (Vol. IV, p. 269), he says, after avowing his continued adherence to the doctrine, “But then this retributive view pure and simple will not work—will not work because of the impossibility of determining the degree of guilt. Therefore, having secured, as we believe, the right to punish, we give weight also to other considerations. We modify our sentence with an eye to the general good. We make an example or, on the other hand, we let mercy or policy more or less abridge strict justice. But with this the retributive principle has ceased to be absolute. Punishment has ceased to be an affair of justice, and we have been forced to recognize a superior duty to be unjust. We have not, indeed, given up the idea of retribution and desert, but we have made it secondary, and subject to the chief end of the general welfare.” Pushing still further this idea, as he says, of being forced by the general welfare to be unjust, he shows that “to remove the innocent is unjust, but it is not, perhaps, therefore in all cases wrong. Their removal, on the contrary, will be right if the general welfare demands it.” It would seem too clear for argument that Mr. Bradley here definitely abandons the retributive for the utilitarian theory; yet, in a note added in answer to a criticism of Mr. Rashdall, he declares that he has “little to correct in the old statement of my [his] view except a certain number of one-sided and exaggerated expressions.”

justification, the consent of the individual. It is correct to say that in the commission of any given deed, the criminal logically accepts as a valid rule of conduct the principle involved in his act, and therefore that he cannot justly complain if society see fit to subject him to the operation of the same rule that he has already applied in his conduct toward others. But this is all. Kant's reasoning does not have any bearing upon the arguments of those who hold the views which we have accepted in this work. Kant says: "Man ought never to be dealt with merely as a means subservient to the purpose of another. . . . Against such treatment his inborn personality has a right to protect him." This principle is a very true one, and in fact constitutes, as we know, the fundamental fact of social justice, but it does not mean that the infliction of an evil upon a person, in order that some future social good may be achieved, is necessarily a contravention of it.

Kant says that a person should never be treated merely as a means. But a person is treated merely as a means only when his right to be considered as an end is wholly ignored. Now, when it becomes necessary in the interest of society to inflict an evil upon an individual, that individual is *quâ hoc* treated as a means; but he is also treated as an end, if in estimating the social good his individual good is considered, and in the selection of him for punishment the choice has been controlled by empiric facts which make it productive of more good than

he, rather than any one or no one else, should be punished. Thus, just as, according to this interpretation of the sanctity of human personality, guiltiness of crime cannot of itself justify the infliction of pain; so, conversely, when the social good demands, innocence from wrong-doing cannot always relieve one from the duty of subjecting himself to, or release society from the obligation of imposing, an evil which in extreme cases may amount even to death. As Rashdall has well put it: "When a man is punished in the interest of society, he is indeed treated as a means, but his right to be treated as an end is not thereby violated, if his good is treated as of equal importance with the end of other human beings. Social life would not be possible without the constant subordination of the claims of individuals to the like claims of a greater number of individuals; and there may be occasions when in punishing a criminal we have to think more of the good of society generally than of the individual who is punished. . . . The retributive view of punishment, however, justifies the infliction of evil upon a living soul, even though it will do neither him nor any one else any good whatever. If it is to do anybody any good, punishment is not inflicted for the sake of retribution. It is the retributive theory, to my mind, which shows a disrespect for human personality by proposing to sacrifice human life and human well-being to a lifeless fetich styled the Moral Law, which apparently, though unconscious, has a sense of dignity, and demands the

immolation of victims to avenge its injured *amour propre.*"<sup>1</sup>

The incorrectness of the retributive theory of punishment becomes manifest when we consider the results to which an attempt to apply it in practice would necessarily lead. In the first place, it would render impossible any penal law whatever, for it would never be possible for courts to gain that knowledge which the theory demands for the just apportioning of penalties. When reduced to their proper meaning, the words retribution, expiation, or vindication, mean the bringing home to the criminal the legitimate consequences of his conduct, that is, legitimate from the ethical standpoint. But this, of course, involves the determination of the degree of his moral responsibility, a task that is an impossibility for any legal tribunal. Conditions of knowledge, of heredity, of training, of opportunities for moral development, of social environment generally, and of motive have to be searched out, which are beyond even the ability of the criminal himself to determine, — far less of others, — before even an approximate estimate can be made of the simplest act. But even could this be done, there would be no possible standard by which to estimate the amount of physical pain to be imposed as a punishment for a given degree of moral guilt. For how measure a moral wrong by a physical suffering? Or, granting what is inconceivable, that such an equivalence could

<sup>1</sup> *International Journal of Ethics*, January, 1900, article, "The Ethics of Forgiveness."

be fixed upon, how would it be possible to inflict upon the culprit just that amount of pain which he might deserve? Individuals differ physically and mentally, and these differences are widened by training and methods of life until it is impossible to determine the degree of discomfort or pain that a given penalty will cause a given individual. The fear of death itself varies widely with different individuals, and the same is true as to the estimation in which all other forms of evil are held. So far, therefore, from there being any certainty that two individuals will be equally punished who are subjected to the same penitential treatment, there is, in fact, almost a certainty that they will not be.

This question of the moral responsibility in the criminal which the retributive theory necessarily predicates, has been rendered doubly embarrassing by the results recently obtained by the new school of criminologists, who term themselves Criminal Anthropologists. By following entirely new methods this school has arrived at conclusions as to the nature and causes of crime differing radically from those which have been formerly held, and which, if they be proved true, must result in almost revolutionary changes in our present penal methods.

Reversing former methods, this school has studied the criminal rather than the crime, and the result of the investigations carried on along this line has been to bring into prominence the conception of the criminal as a being physically and psychically degenerate. Every crime, no matter by whom com-

mitted, or under what circumstances, is to be explained in but two ways: either as the act of the individual's free will, or as the natural effect and as the necessary result of social and physical causes. Our present methods of punishment are based upon the idea that a crime is the free act of a person who, actuated by motives of gain or passion, deliberately contravenes the law. Now and then is raised in our courts the plea of insanity or temporary aberration of mind or kleptomania, but in the vast majority of cases the criminal is considered as not differing in body or mentality from honest men. He is considered as wholly responsible for his own act and is punished accordingly.

According to the new school of criminal anthropology, this theory of crime and its punishment is radically wrong. Crime, its members say, is in the great majority of cases due to disease, to a mental state of the criminal which predisposes him to the commission of illegal acts. The study that has been made of the brain and mental peculiarities of those convicted of criminal offences clearly proves this, they say, to be so. This being so, our penal methods should look primarily to the cure of the criminal and not to his punishment. No man, whatever his offence, should be discharged from restraint except upon reasonable evidence that he is morally, intellectually, and physically capable of leading an honest life. It may sound strange, but it is alleged that it is correct to say that it is as natural for some people to commit crime when under provocation or

temptation as it is for a dyspeptic to have indigestion after overeating, or a rheumatic to suffer from the result of exposure. Crime, in short, is due to some fault in his organization which renders the individual less able to withstand temptation or to control improper desires. Whenever in any one's mental outfit there is any maladjustment (and the doctors tell us that none of us are sound in every particular), there is present a tendency to peculiarities that affect our motives and actions. The criminal is, therefore, to be judged as one whose mental peculiarities are such as to make the commission of crime more easy to him than it is to others.

Between the violently insane, the idiot, and the one whose moral faculties are merely blunted, and the sense of right and wrong indistinct, there are all grades of criminality. On the border line of lunacy lie the criminal populations. The criminal has thus been defined as "an individual whose organization makes it difficult or impossible for him to live in accordance with the standard which the civilization in which he lives sets up and makes it easy for him to risk the penalties of acting anti-socially. By some accident of development, by some defect of heredity or birth or training, he belongs as it were to a lower and older social state than that in which he is actually living. It thus happens that our own criminals frequently resemble, in physical and psychical characteristics, the normal individuals of a lower race" (Ellis).

The conception of crime as due to defective mental organization of the criminal, explains to us many of the points that have hitherto perplexed us. In the first place, it gives us a reason for the repeated instances in which we find persons committing crimes where there seems to be no sufficient motive, and when it must be apparent to the ones committing them that immediate discovery and severe punishment are to be the sure result. Murders are frequently committed upon the most trivial grounds, and nothing is more common than to find prisoners who seem to take a genuine delight in thieving, even though not in want. Secondly, the definition of the criminal as one of defective organization, who is on a lower plane of civilization than that on which he is actually living, explains the increase of crime in the face of an advancing civilization and a widening diffusion of wealth and education.

With the instincts of a savage, the criminal is forced to live among civilized people. "Criminality, like insanity, waits upon civilization," says Ellis. With the growth of society in complexity and delicacy, the demands upon the social nature of the individual become greatly increased. Organized as modern society is, the duties of the individual to his fellow-man and to society at large are immensely greater than they are in savage countries where there exist no mutual rights and duties outside of the family; where law, if it may be so called, covers only a few points, and each one lives only for himself, and his actions do not conflict with the rights

of others. So far, then, as society has within its bounds members who are mentally unfit to meet the requirements of its civilization, it will have violators against its laws, and these it will have no matter what its economic prosperity or the severity of the punishment meted out to the offender. The increase, then, in crime which, as we shall presently see, is asserted by some, may be said to be due to the fact that, as the demands of civilization have increased, the chances of having members of the State who are not able to meet these standards have increased; and this increase our penal methods, aiming at punishment rather than at cure, have not been able to check. Modern civilization represents the last and final efforts of the wisest, and with its development there is an increasing need of proper treatment of, and assistance to, those who are by organization unqualified to keep pace with it on its onward march.

Again, the conception of crime as due to pathological condition explains the difficulty of reforming criminals. It explains also why our methods of punishment seem to have so little deterrent effect. It is because they have no power to reform the diseased condition of the prisoner's mind, and are not imposed for that purpose. As showing how little really deterrent effect even the severest punishments have, Rev. W. Roberts, chaplain of Bristol jail, says that out of 167 attended by him under sentence of death, 164 had witnessed hangings. George III added 156 crimes to the list of 67 which had already

been made capital crimes, with a result that from 1806 to 1819, during which time this code remained unchanged, the number of indictable offences increased threefold. "If deterrence enters as an element into the calculation of habitual criminals," says Mr. Dugdale, "it acts chiefly as a stimulant for contriving new methods by which the penalty may be avoided."

Finally, the hereditary nature of criminality shows its character as a disease. The investigations of experts leave no room for doubt upon this point. Mr. Morrison states that the statistics that he has collected show that more than one-fourth of criminals have received a defective organization from their ancestry; and further, that between forty and fifty per cent of convictions for murder are cases in which the murderer is either insane or mentally infirm. The most startling and conclusive proofs of the inheritability of criminal tendencies have been furnished by the American investigators Mr. Dugdale, in his famous study *The Jukes*, and Mr. McCulloch, in his book upon *The Tribe of Ishmael*. The results of these two investigators have become so well known as not to need repetition here.

With what success modern criminal anthropologists have succeeded in discovering and describing distinct criminal types, is a matter open to controversy.<sup>1</sup> But one point they do appear to have established, and this is that physical and mental

<sup>1</sup> For a very able criticism of this school, see the work of Proal, *Le Crime et la Peine*.

abnormalities are far more frequently discovered in the habitual criminal than in the ordinary man.

The point which is of special interest to us in all this is that, just to the extent to which the thesis is maintained that crime is due to disease, in corresponding degree should, according to the retributive theory, the severity of punishment be relaxed; and where the will is discovered entirely impotent to restrain the instincts and desires of a diseased mind and body, punishment should be wholly remitted. If, then, to the amount of irresponsibility traceable to this source, we should join that which is directly traceable to improper social environment (for which society is itself largely responsible), we would find, according to the retributive theory, that it would be practically impossible definitely to determine even the presence, much less the degree, of that moral responsibility upon which the right to punish is founded. And thus there would logically arise the necessity of declaring the non-amenability to punishment (though not to treatment) of that most dangerous of all social types, the "instinctive criminal."

Another objection to the retributive theory is the point which Fichte makes, that in attempting the punishment of crimes *as sins*, men are arrogating to themselves the ability and the right to determine for others not simply what, as a matter of fact, society or the State will allow them to do, but what is for them morally right or wrong. "The question is not at all whether the murderer suffers unjustly when he also loses his life in a violent manner," says Fichte,

“ but the question is : Whence does any other mortal derive the right to personify this moral rule of the world, and to punish the criminal according to his deserts ? A system which asserts the supreme ruler of a State to have this right is undoubtedly compelled to say that the title to it is beyond demonstration, and hence to call it a right given by God. Such a system is, therefore, bound to consider the monarch as the visible representative of God in this world, and to consider all government as a theocracy. In the Jewish theocracy the doctrine was, therefore, eye for eye, tooth for tooth, and very properly.”<sup>1</sup>

<sup>1</sup> *Science of Rights* (translation of Kroeger), p. 371. Fichte in this takes a ground radically different from that assumed by Kant, and in fact, except where he is influenced by his conception of a social compact, approaches very nearly our own views. “ Punishment,” he says, “ is not an absolute end. In fact, the proposition that punishment is an end for itself, as is, for instance, involved in the expression ‘ He who has killed must die,’ is positively meaningless. Punishment is merely a means for the end of the State ‘ to maintain public security,’ and the only intention in providing punishment is to prevent by threats transgressions of the law. The end of all penal laws is that they may not be applied.”

Fichte, to be sure, goes on to hold that the punishment should, as far as possible, be made equal to the crime, — *poena talionis*, — but he does so not upon vindictive grounds, but upon the simple utilitarian theory that thus the penal law exercises its greatest deterrent effect. In fact, as he admits, the principle cannot be applied at all in cases where, as he expresses it, the will of the transgressor is *formaliter* evil ; that is, where the violation of the law is done not for the sake of getting possession of another person’s goods, but merely for the sake of injuring the other. Here, then, is a case where the sentiments and intentions of the crime must be taken notice of. “ Nevertheless,” Fichte hastens to add, “ it should not be held that this is a case wherein the morality of the act is to be considered. No man can and no man should be the judge of another’s morality. The only object of civil punishment, and the only measure of its degree, is the possibility of public security. Violations of the law prompted by malicious intentions are to be punished more severely than violations

That, as Fichte says, there is hidden in the retributive theory the premise that those in authority are endowed with the right not only to pass moral judgment upon the conduct of those subject to its authority, but to act as the instruments for visiting upon sinners that evil which by divine order should be attached to moral wrong, becomes very evident in the doctrine as declared by the Rt. Hon. Sir E. Frey,<sup>1</sup> and as repeated by Mr. Justice Kennedy of the Queen's Bench, England.<sup>2</sup>

inspired by selfish motives; not because they are more immoral,—morality, indeed, has no degrees, and there is only one morality,—but because fear of a milder punishment, a punishment simply of equal loss, would not afford adequate security."

For a further discussion of the retributive theory, see Vidal, *Principes fondamentaux de la Pénalité dans les systèmes les plus modernes*, pp. 264-293; Franck, *Philosophie du droit pénal*, Part I, Chapters VI and VII; and Fouillée, *Science sociale contemporaine*, Book IV, Chapter III. Fouillée is especially emphatic in his repudiation of the theory. He denies, and with justness we think, that rationally there can be predicated of a God himself, considered as a just and loving Father, the right, or much less the disposition, to inflict a punishment for its own sake; that is, without reference to any possible future good to the one punished. The good should be happy, Fouillée says, for all human beings should, if possible, be happy; but the bad should not necessarily be unhappy, for no one should be unhappy without sufficient reason. What suffering there should be as a result of sin, says Fouillée, should be mental; that is, in the conscience, and this should be voluntary regret, not one based on resulting evil that the law has inflicted. "S'il y a un Dieu, répétons-le, ce Dieu lui-même n'a pas le droit de punir. En effet, de deux choses l'une: ou le mal moral est un mal par lui-même, et alors il est inutile d'y ajouter une peine extérieure non motivée par une légitime défense: ou le mal moral n'est pas un mal par lui-même, mais seulement par la pure volonté de Dieu, sit pro ratione voluntas et alors la peine extérieure ne serait qu'un nouvel acte de despotisme ajouté à une loi déjà despotique." (3d edition, p. 296.)

<sup>1</sup> "Inequality in Punishment," *Nineteenth Century*, 1883, p. 517.

<sup>2</sup> Address before the American Bar Association, August, 1899. Reprinted in *American Law Review*, Vol. XXXIII, p. 731.

"Punishment," says Frey, "is an effort of man to find a more exact relation between sin and suffering than the world affords us. . . . It seems to me that men have a sense of the fitness of suffering to sin, . . . that so far as the world is arranged to realize in fact this fitness in thought, it is right; and that so far as it fails of such arrangement it is wrong, except so far as it is a place of trial or probation; and consequently that a duty is laid upon us to make this relationship of sin to suffering as real and as actual and as exact in proportion as it is possible to be made. This is the moral root of the whole doctrine of punishment."

One final proof of the invalidity of the retributive theory may be mentioned, and that is that, when accepted as an absolute principle, no possible room is left for the idea of forgiveness. If it be right that a sin should be punished simply and solely because it is a sin, then forgiveness or remission of punishment can never be other than a violation of that moral law. Where the duty of punishment is absolute, a duty of forgiveness cannot exist. Here, then, unless we would take the extreme position of saying that the idea of forgiveness should play no part in our ethical system, are two inconsistent principles. But, according to all reason and philosophy, no principle can be considered as true in itself which necessarily leads to internal contradiction.<sup>1</sup>

<sup>1</sup> This point has been well made by Mr. Rashdall in his article, "The Ethics of Forgiveness," in the *International Journal of Ethics*, January, 1900.

This difficulty vanishes, however, when we frankly accept the principle that pain, when bestowed, should ever be for the purpose of obtaining some future good. For then we can recognize that when a greater good will be secured by forgiveness than by punishment, it is right that the forgiveness should be extended. "Upon this view of the relation of punishment to forgiveness, there is no absolute antagonism between that sense of forgiveness in which it is opposed to punishment and that sense in which it is compatible with punishment. Just the same considerations which impose the duty of punishment will limit the means of it; just those same considerations which allow the total remission of penalty in some cases will allow of some mitigation of it in other cases, and will impose in all cases the duty of showing whatever benevolence and good-will toward the offender is compatible with that measure of punishment which social duty demands. Punishment and forgiveness, when they are what they ought to be, being alike the expression of love, the mode and degree of their combination will likewise be only the application of the general precept of love to the circumstances of the particular case."<sup>1</sup>

Before leaving the criticism of the retributive theory, one other point is to be noticed. This is, that the acceptance of the retributive idea has undoubtedly been influential in dictating to legislators and courts those extraordinary severities of

<sup>1</sup> Mr. Rashdall, in the article quoted.

punishments which have unfortunately so characterized the administration of criminal justice in the past. Where it is looked upon as the law's province to mete out punishments equivalent to the moral offence committed, almost no physical suffering can in theory be deemed excessive. For how measure in temporal terms the quantity of a violation, however slight, of the Almighty's will? It was, in fact, by expressly calling back the criminal law to simple utilitarian ends that such writers as Beccaria, Montesquieu, and Bentham were able, by their influence, to put a stop to that vast amount of needless suffering which was the result from the administration of the criminal laws of a hundred years ago.

**Revenge.** — It will undoubtedly be asked as an objection to repudiating absolutely the retributive idea of punishment, "Is not indignation at a wrong done a righteous feeling; and is it not right to embody this indignation in concrete, effective form in our criminal laws? Is it not right that we should feel a certain satisfaction, and recognize a certain fitness in the suffering of one who has done an intentional wrong? Shall the murderer go unscathed, and the adulterer be freed from the penalty for his crime?"

To these questions we answer that it is right, indeed that it is morally obligatory upon us to feel indignant at a wrong done. But it is not right that we should wish evil to the offender save as possible good can come from that evil. The two feelings are wholly distinct. The one is a feeling of moral revul-

sion and is directed at the crime. The other is a desire for vengeance, and is directed at the criminal.

Now it is true that in the lower stages of culture vengeance has played a socially necessary part. When men generally recognized no rights in others which they were morally bound to respect, and no controlling political power existed to compel them to do so, the fear of provoking retaliation on the part of the injured party and his family and friends, necessarily furnished the sole restraining power. "Gratitude," says Lecky, "has no doubt done much to soften and sweeten the intercourse of life, but the corresponding feeling of revenge was for centuries the one bulwark against social anarchy, and is even now one of the chief restraints to crime."<sup>1</sup>

The correctness of this last assertion as applied to any particular people, evidently depends upon the character and efficiency of its criminal law. In so far as crime is not adequately controlled by the State, or the pursuit of private vengeance permitted, this latter element does of course exercise a deterrent effect upon those who are restrained from acts of violence only by the fear of the punishment that follows.

Furthermore, in an historical sense, our present criminal law is founded upon the idea of vengeance. The steps by which the transition was made have been recently described by Jenks in a most luminous manner.<sup>2</sup> "The earliest notion of justice, as distinct from mere indiscriminate revenge, that we find

<sup>1</sup> *History of European Morals*, Vol. I, Chapter I.

<sup>2</sup> *Law and Politics in the Middle Ages*, Chapter IV.

among the Teutonic peoples," says Jenks, "is undoubtedly the blood feud. Barbarous as such an institution appears to us, we have but to think for a moment, to realize its immense importance as a step in human progress. A man receives a wound from another; is perhaps killed. Instantly the passion for slaughter awakes. All who are in any way interested in the dead man — those who worshipped his gods or fought by his side — are eager to avenge his death on any person who may be supposed to be connected with his murder. General carnage is the result; no man's life is safe. But if it can once be established that the right of vengeance belongs only to a limited circle of the dead man's relatives, and may be exercised only against the immediate relatives of the offender, the area is substantially narrowed, the evil of the deed proportionally decreased. This is the work of the blood feud. . . . To the blood feud, . . . succeeds the *wer* or money payment as compensation for the injury inflicted." Two points need to be noticed regarding this system. First that, originally, it was a purely voluntary system; and, secondly, it was always admitted that there were some offences for which the money payment could not atone. "These are our two starting points for the history of state justice. The King comes to the help of the clan by compelling the avenger to accept the *wer* and by compelling the offender to pay it. He likewise takes upon himself the punishment of bootless crimes."

The punitive power of the State once asserted and

recognized, its growth in influence and authority is constant, until the old idea of a crime being but a matter involving the private interests of two or more individuals, if not absolutely destroyed, is at least nearly lost sight of in the doctrine that a violation of an established right is primarily an offence against the State, and to be punished as such.

The point which we wish to make, however, is that this change of view, when properly interpreted, represents not simply the idea that the State takes the place of the individual for the purpose of avenging the original wrong, but that the very idea as to nature of, and the very purpose for which, the penalties of the criminal law are imposed, is changed. Punishment is inflicted no longer because of the simple desire that the offender shall suffer pain, but in order that either he or society may derive some benefit therefrom. Thus that personal spirit of malevolence, which is of the essence of revenge, is entirely absent, and in its place is the impartial, unimpassioned voice of the law. Or, to use the more metaphysical expression, the universal will is substituted for the particular will. The subjective element is destroyed.

To revenge oneself is, in truth, but to add another evil to that which has already been done; and the admission of it as a right is, in effect, a negation of all civil and social order, for thereby are justified acts of violence not regulated by, nor exercised with reference to, the social good. The idea that in the criminal law the State "avenges" the wrong done

to itself and to individuals is, in fact, but a remnant of the old "natural rights" and "social compact" theories, according to which individuals originally had a "right" of self-protection and of vengeance which, when the body politic was formed, was handed over to it for exercise, and that thus the State obtained a just authority to exercise force and punitive power.

There are few who in modern times assert the abstract rightfulness of a desire for vengeance, but among these few is to be found the eminent writer upon criminal law, the late Justice Fitzjames Stephen.<sup>1</sup> The statement of his position upon this point is in the following emphatic terms: "The infliction of punishment by law gives definite expression and a solemn ratification to the hatred which is excited by the commission of the offence, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it." "I am of opinion," he continues, "that this close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community. I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to

<sup>1</sup> See his *History of the Criminal Law of England*, Chapter XVII.

that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it."

To the declaration that it is natural and right that we should hate the criminal, if by that is meant that we detest his crime and are indignant at him for committing it, no objection can be made. Nor can any be made to the assertion that it is well that this hatred should find expression in the law, if by this is meant that a moral influence is exerted by the fact that thus there is stamped in plain and unmistakable terms the disapproval of the sovereign power of the reprobated acts. This we may term the educative service of penal law. It is a truth, unfortunate though it may be, that in every community a very considerable number of the people derive in large measure their conceptions of right and wrong from the commands and prohibitions of the law. Upon all such, the fact that the sovereign authority of the State has declared a given act to merit a more or less severe punishment, is not without its influence. It is desirable, therefore, aside from any other services that the criminal law may perform, that, as Stephen says, the criminal law should be so drawn as to express the true detestation in which immoral acts should be held. But Stephen, in the sentences which follow those already quoted, seems to go much further, and to defend revenge pure and simple.

"These views" (which we have just quoted), he

says, “are regarded by many persons as being wicked, because it is supposed that we ought never to hate, or wish to be revenged upon any one. The doctrine that hatred and vengeance are wicked in themselves appears to me to contradict plain facts, and to be unsupported by any argument deserving of attention. Love and hatred, gratitude for benefits, and the desire for vengeance for injuries, imply each other as much as convex and concave. Butler vindicated resentment, which cannot be distinguished from revenge and hatred except by name, and Bentham included the pleasures of malevolence amongst the fifteen which, as he said, constitute all our motives of action. The unqualified manner in which they have been denounced is in itself a proof that they are deeply rooted in human nature. No doubt they are peculiarly liable to abuse, and in some states of society are commonly in excess of what is desirable, and so require restraint rather than excitement ; but unqualified denunciations of them are as ill judged as unqualified denunciations of sexual passion. The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice as the most emphatic of such forms, stand to the one set of passions in the same relation in which marriage stands to the other.”

Here it is quite plain that, if we accept the literal meaning of the words used, Justice Stephen defends as ethically proper, under certain circumstances, the desire for vengeance. If, however, we examine carefully the thought, we think that it will be found that

that which Stephen really has in mind is, after all, that feeling of indignation which we may properly feel at the commission of a wrong, rather than the idea of revenge pure and simple. Thus he begins the second quotation which we have made by saying that "these views" — namely, those expressed in the first quotation regarding the propriety of an indignation against wrong-doing — "are often regarded as wicked because it is supposed that we ought never to wish to be revenged upon any one." Again, a little later on, he speaks of the criminal law as being one of the most emphatic forms in which "deliberate anger and righteous disapprobation" are expressed. Stephen no doubt felt most strongly the educative value of the criminal law in bringing home not only to the criminal himself but to all others the evil consequences of immoral acts, but he errs when he confuses this with the idea of revenge. The desire for revenge means nothing more than the wish that the object of one's hatred shall be visited by an evil simply and solely because of the suffering it will cause him. We think that if Stephen had eliminated from his thought the belief in the possible educative value of the punishment, he would have seen that what would be left would not be a sentiment ethically defensible. Thus, to reduce the matter to concrete statement, we do not believe that Stephen, or any one else who accepts his views, would be ready to say that he would wish that, as a penalty for his crime, a criminal should be visited by an evil, say for instance a grievous sickness, which neither he nor

others would or could recognize as being a return upon him of the consequence of his own evil act.

Hegel has often but incorrectly been interpreted as advocating the retributive theory of punishment. The true ground upon which he justifies the deliberate infliction of suffering upon a wrong-doer is that this suffering at least tends to have upon the criminal himself the educative effect of which we have been speaking.<sup>1</sup> Hegel uses the word retribution, but, as the context shows, it is as having this educative sense, and not that of revenge. "In the sphere of direct right," says Hegel, "the suppression of crime takes in the first instance the form of revenge. This in its content is just, so far as it is retribution; but in its form it is the act of a subjective will, which may put into an injury an infinite or unpardonable wrong. Hence its justice is a matter of accident, and for others means only private satisfaction. As revenge is only the positive act of a particular will, it is a new injury. Through this contradiction it becomes an infinite process, the insult being inherited without end from generation to generation. Whichever crime is punished not as *crimina publica*, but as *privata*, it still has attached to it a remnant of revenge."<sup>2</sup> "The injury which the criminal experiences is inherently just because it expresses his own inherent will; it is a visible proof of his freedom and is his right. But more than that, the injury is a

<sup>1</sup> Cf. an article by McTaggert entitled, "Hegel's Theory of Punishment," in the *International Journal of Ethics*, Vol. VI, p. 479.

<sup>2</sup> *The Philosophy of Right*, translated by Dyde, § 102.

right of the criminal himself, and is implied in his realized will or act. In his act, the act of a rational being, is involved a universal element which by the act is set up as the law. This law he has recognized in his act, and has consented to be placed under it as under his right.”<sup>1</sup> The matter is, however, put in a nutshell when Hegel says that in his idea of retribution there is implied no pleasure for the objective will, such as is involved in the idea of revenge, but simply the “turning back of crime against itself. The Eumenides sleep, but crime wakes them. So it is the criminal’s own deed which judges itself.”<sup>2</sup>

Hegel does not deny that the criminal law may be made to serve other purposes than that of awakening the criminal to a true comprehension of the nature of his deed, but this last should ever, he thinks, furnish the fundamental motive. “The treatment of punishment in its character as a phenomenon,” he says, “of its relation to the particular consciousness, of the effect of threats upon the imagination, and of the possibility of reform is of great importance in its proper place, when the method of punishment is to be decided on. But such treatment must assume that punishment is absolutely just. Hence everything turns on the point that in crime it is not the production of evil but the injury of right, which must be set aside as overcome. We must ask what that is in crime, whose existence has to be removed. That is the only evil to be set aside, and the essential thing to determine is wherein that evil lies. So

<sup>1</sup> *Idem*, § 100.

<sup>2</sup> *Idem*, § 101.

long as conceptions are not clear on this point, confusion must reign in the theory of punishment."<sup>1</sup>

It is scarcely necessary to point out that in abandoning the theory of revenge, Hegel definitely places himself upon the ground that the purpose of punishment should be utilitarian ; that is, that its imposition should be for the attainment of some present or future good. His theory, in fact, very much resembles what is generally known as the Reformatory Theory. It differs from that theory, however, in one important respect. While those who accept the reformatory theory desire that one of the aims of our penitential systems should be to awaken the conscience and change the disposition of the criminal, the aim which Hegel has in mind is rather to arouse the comprehension of the wrong-doer to the true nature of his act. The object is thus to stimulate his cognitive faculties, rather than to increase his sense of moral obligation ; to show what is right and what is wrong, rather than to teach him that he should do what is right and avoid doing what is wrong. For this reason we have preferred to call Hegel's theory Educative rather than Reformatory.

Hegel has in mind solely the possible educative value of punishment upon the criminal himself. Logically, however, the theory includes the educative influence that it may have upon the community at large. In actual effect, indeed, this may easily be much the more important part of the educational influence exercised by it.

<sup>1</sup> *Idem*, § 99.

How far it is possible either to educate or reform the criminal by punishment, is a matter upon which persons will naturally differ. Personally we are inclined to believe that it can reform him only as it educates him. With the true nature of his act clearly brought home to him, the conscience of the criminal, so far as it is not already blunted, will then exercise its controlling power to prevent a repetition of the same or similar conduct. But directly to awaken the conscience by a series of pains, if not impossible, is certainly difficult. As *Hudibras* has said, "No thief e'er felt the halter draw with just opinion of the law"; and as George Eliot in her *Felix Holt* declares, "Men do not become penitent and learn to abhor themselves by having their backs cut open with the lash; rather they learn to abhor the lash."

Perhaps, however, it will be said this does injustice to the reformatory theory. It may be said that those who emphasize the reformatory element in the administration of penal justice maintain, not that the punishment which is inflicted has, or can be made to have, a reforming influence, but that the State should seek to reform the criminals while punishing them.<sup>1</sup> But if this be so, then the theory is not one of punishment at all. For the reformation,

<sup>1</sup> See on this point the excellent paper of Mr. McTaggert, in the *International Journal of Ethics*, already quoted, and that of Mr. Rashdall in the same Journal (II, 20) entitled "The Theory of Punishment." "When a man is induced to abstain from crime," says Rashdall, "by the possibility of a better life being brought home to him through the ministrations of a prison chaplain, through education, through a book from the prison library, or the efforts of a Discharged Prisoners' Aid Society, he is not reformed by punishment at all."

if it comes at all, is then the result from the discipline that the prisoner receives, not from the incarceration which is imposed as punishment. Furthermore, the deterrent element in punishment is not to be confused with the idea of reformation. An experience of the painful consequences of crime may deter a criminal from again violating the law, not because it shows him the immorality of his conduct, but because it demonstrates its inexpediency.

**Utilitarian Theories of Punishment.** — To a very considerable extent we have already presented the grounds upon which the other than retributive theories of punishment are based. The retributive theory stands *sui generis* in that it alone looks wholly to the past and rejects as unessential to, if not inconsistent with, itself all utilitarian considerations. In rejecting the retributive theory, therefore, we necessarily accept the utilitarian theory that punishment, to be justly imposed, must have for its aim the realization of some future good. These utilitarian theories differ from each other according to the nature of the good sought. Thus we have: (1) The Deterrent Theory, according to which punishments are inflicted in order that other would-be law-breakers may be dissuaded from crime; (2) The Preventive Theory, the aim of which, as its name implies, is to prevent the repetition of the offence by the surveillance, imprisonment, or execution of the criminal; (3) The Reformatory Theory, the object of which is the moral reformation of the delinquent; and (4) The Educative Theory, of which we have already spoken.

A point to be noticed about these theories is that they are not mutually exclusive. There is no reason why, the utilitarian idea being once accepted, we should not strive to reach in our penitential systems beneficial results in all four of the directions mentioned. It is therefore possible to speak of a given law being founded on one or the other of these ideas only in so far as deterrence, prevention, education, or reformation, as the case may be, is placed in the foreground as the chief end to be realized.

But we may go further than simply to declare that these theories are not mutually exclusive. We may assert that it is rationally impossible to select any one aim and to declare that in any system of penal justice that one should furnish the sole motive for its enactment and enforcement. It may be possible to pass particular laws the aim of which is solely in one or the other of these directions; but to attempt the establishment of an entire criminal code with but a single aim would inevitably lead to absurdities and injustices. If absolute prevention were the sole aim, capital punishment or lifelong imprisonment would be the normal punishment called for; for in no other way could there be furnished a guarantee against a repetition of the offence by the convicted one. If reformation were the sole aim sought, then, not to mention other absurdities, it would be necessary for a court to release from all punishment those hardened and habitual criminals regarding whom experience had demonstrated penal law to be without a reformatory influence. If

deterrence were accepted as the absolute canon, we would be obliged to abandon all attempts at reformation, and by the strictness and severity of our punishments give ourselves up to an appeal simply to the fears of mankind. Finally, if the educative theory were to be solely relied upon, we would not be able to modify the character and severity of our punishments so as best to meet threatened invasions of social or political order. This would mean that in times of greatest need the State would find itself powerless. Thus, for example, should a grievous pestilence be threatened, necessity would demand that violations of quarantine and other health ordinances should be prevented at all hazards, and hence that extraordinarily severe penalties should be attached to their violation. Or, again, in a time of great political unrest and disorder, when the very life of the State is threatened, martial law would be demanded. But if we accept any but the deterrent theory as absolutely sufficient in itself, such measures would be unjustifiable.

As we have seen, the retributive theory rests under the embarrassment of predicating as a ground for the right to punish a motive which logically necessitates that the character and degree of the punishments which are inflicted should correspond with the degree of moral guilt of the offenders, whereas the determination of this degree of guilt is inherently beyond the power of any criminal court. From this difficulty the utilitarian theory is free. We have spoken of the ideas of deterrence, reforma-

tion, education, and prevention as distinct from one another, and so they are. Yet when viewed in their proper light, they are all but different phases of one supreme idea, the social welfare. The aim of the criminal law, like that of the civil law, and indeed of all laws and principles of conduct, is the general weal. Therefore, in passing upon the propriety of emphasizing in a given piece of legislation any one of these ideas, whether of reformation, education, prevention, or deterrence, it is ever necessary to consider the matter in its social and not in its individual light. There may thus be cases in which, as to the particular criminal or criminals concerned, a remission of punishment would exercise a more beneficial influence than its imposition, but in which social considerations demand a satisfaction of the law's full severity.

The bearing of this upon the question of justly apportioning penalties is that it makes it no longer necessary to attempt the impossible task of making the punishment correspond to the degree of the criminal's guilt, but leaves it open to the laws and to the courts to arrange their judgments according to the practical exigencies of each case as determined by the social need.

Vidal, in his *Principes fondamentaux de la pénalité*, denies the validity of the social-defence theory, on the ground that it justifies the treatment of the individual criminal as a mere means to social welfare; that it improperly divorces the ideas of punishment and desert, and reduces the whole question

to one of simple convenience. As an example of all that is bad, he quotes the following declaration of Le Bon:<sup>1</sup> "The questions of responsibility and free will plainly have nothing to do with what we have been saying. . . . When a viper or an enraged dog wounds me, I do not stop to ask whether the animal be responsible for his act. I seek to protect myself, and to prevent it from injuring me and others. Nearly all criminals are irresponsible, in the sense that by their own nature or by circumstances they cannot help being malefactors. But in what respect do these formidable beings merit a greater regard than the millions of innocents whom we see miserably dying upon battle-fields in order to defend causes, of even the nature of which they are ignorant?"

The objections of M. Vidal to the social-defence or social-welfare theory disappear when we point out that, as has been before said, a criminal is not treated merely as a means when his good is given equal consideration with the good of others in determining the general welfare, and when we call attention to the fact that the term "social welfare" is not to be understood as connoting mere material welfare, but the highest ethical good possibly attainable. One often sees the social-defence theory justified by comparing it with that instinctive right of self-defence which every living organism exercises. While as a simple analogy this is not inapt, it is yet mis-

<sup>1</sup> From his article, "La Question des Criminels," in the *Revue Philosophique* for 1881.

leading in that it apparently reduces the right to one of simple defence against loss or physical injury, whereas it should be justified upon higher ethical grounds.

**Law and Morality.** — To what extent, it may be asked, does either the theory or practice of our criminal law conform to the principle which we have established that the idea of retribution or expiation should be repudiated? Very little, one is, at first thought, inclined to answer. Indeed, if we were to ask the ordinary individual to define the relation between law and morality, the answer we should almost certainly get would be that legal rights and duties are such moral rights and duties as are recognized and enforced by the State; that the law, so far as it extends, occupies the same sphere as morality, and exists in the main for the same purpose.

As a matter of fact such a description is not correct. Legal rights and duties and moral rights and duties are never distinguishable simply by the fact that for the one the sanction of the State is supplied, and for the other not. It is true that very many legal rights and duties are also moral rights and duties, but they are recognized by the law not, primarily, because they are such, but for another reason, namely, because their enforcement is deemed advantageous to the State. That is to say, we maintain that an act is prohibited by the law, not because it is considered sinful, as tested by some moral standard, but because the safety or welfare of

society demands it. Thus we find Sir Frederick Pollock declaring that—"though much ground is common to both, the subject-matter of Law and of Ethics is not the same. The field of legal rules of conduct does not coincide with that of moral rules, and is not included in it; *and the purposes for which they exist are distinct.* Law does not aim at protecting the individual character of men, but at regulating the relations of citizens to the commonwealth and to one another. And, inasmuch as human beings can communicate with one another only by words and acts, the office of law does not extend to that which lies in the thought and conscience of the individual."<sup>1</sup> The true reason why the criminal law does not attempt the punishment of moral guilt is, therefore, not because it does not have the means at its disposal for discovering and correctly measuring it, but because that is not the purpose for which it exists. In short, the criminal law would not punish sin, *quâ* sin, if it could.

It may be replied, however, that such ideas as malice, motive, and extenuating circumstances are found playing prominent parts in the definition of crimes, and in the administration of criminal justice. In a certain sense they do; but not in such a sense as to invalidate the position that we have assumed. Let us see how this is.

First of all we must distinguish between the ideas of intent and motive. Intent has reference to the will of the agent, and when present indicates that

<sup>1</sup> *First Book of Jurisprudence*, p. 44.

the agent desires the result which is the consequence of his act. Amos defines it as that "foresight or . . . attitude of mind, of a person about to act, towards the immediate consequences of his act."<sup>1</sup> Motive, on the other hand, has reference to the ground or reason upon which intent is founded. Thus, when one man shoots another, the intention is exhibited by the fact that the slayer, knowing the nature and necessary consequences of his act, freely wills to pull the trigger, because he desires the death of his victim. The motive, however, for the act lies in the anger, jealousy, cupidity, or fear which has aroused the desire.

It does not need be said that, while the intent must be present in order to create moral responsibility, it is the character of the motive which in ethics constitutes the main factor in estimating the degree of guilt. In law, on the other hand, the motive is almost never considered, and even the intent may or may not be actually present; for though in general the law punishes only intentional acts, yet, under certain circumstances, it will presume an intent, and not allow this presumption to be rebutted by the defendant. Thus if a man of sane mind fire a loaded pistol upon a crowded street, he may be held criminally responsible for the consequences of his deed even though he intended no harm. He will not be allowed even to produce evidence that he was without evil intent, except in answer to the charge of murder. This doctrine of the law is

<sup>1</sup> *Science of Law*, p. 103.

founded upon the conception of an average man, and every individual is called upon, at his peril, to show that discretion in his conduct which becomes such an average individual. This is clearly a repudiation of the idea that punishment should be apportioned according to actual moral guilt. For, as a matter of fact, the individual may be in intelligence below the standard of the average man, but, unless this deficiency is so marked as to fall within the exceptions based on infancy or madness, it is disregarded by the law. Criminal liability, says Holmes, "is found in the conception of the average man, the man of ordinary intelligence and reasonable prudence. Liability is said to arise out of such conduct as would be blameworthy in him. But he is an ideal being, represented by the jury when they are appealed to, and his conduct is an external or objective standard when applied to any given individual. That individual may be morally without stain, because he has less than ordinary intelligence or prudence. But he is required to have those qualities at his peril. If he has them, he will not, as a general rule, incur liability without blameworthiness."<sup>1</sup>

Again, take that well-known maxim that "ignorance of the law excuses no one." What possible ground can there be for the rigid enforcement of such a principle except simple expediency? No legislator or judge would deny that instances are constantly occurring in which persons offend the

<sup>1</sup> O. W. Holmes, Jr., *The Common Law*, p. 51.

law by reason of an ignorance due to no real fault on their part. Yet because many guilty would escape, were it allowable for ignorance to be set up as a defence, social safety demands that the rule be made absolute.

The attitude of the law towards motive and intent is made more manifest by the manner in which the idea of "malice" is defined by it. In ordinary use the word "malice" indicates that there is in the mind of him by whom it is held an evil motive or desire. In the law this is not the case. In its eyes it has simply the ethically neutral meaning of an intent to violate a law, whether with good motive or bad. Thus in *Bouvier's Law Dictionary*, the word is defined as, "the doing a wrongful act intentionally without just cause or excuse." And it is added: "Malice is never understood to denote general malevolence or unkindness of heart, or enmity toward a particular individual, but it signifies rather the intent from which flows any unlawful and injurious act committed without legal justification." In short, then, malice, in the legal sense, connotes a particular kind of intent; namely, the intent to violate a law; or, to put it another way, to commit an injury without sufficient legal justification.<sup>1</sup> Thus the offence of "malicious prosecution" means simply the institution of criminal legal proceedings against

<sup>1</sup> Here, as said above, the intent may be not a real but only a presumed one. Thus, in slander, the real question is not as to whether the defendant intended to injure the plaintiff by the words spoken, but whether, as a matter of fact, the words uttered were of such a character as to be calculated to injure.

another without sufficient legal justification. So also, when we speak of *malice prepense*, as required to be proved in order to convict one of murder, the meaning is nothing more than that it must be shown that the defendant actually and deliberately intended to slay his victim.

Sometimes, however, it is true that courts of law actually attempt the determination of the presence or absence of a motive as distinguished from mere intent. This occurs when there is doubt as to whether a given act has been committed by the individual charged with it. In such cases the presence or absence in the individual on trial of an adequate motive for committing the crime in question has a value as circumstantial evidence. Here it is to be observed, however, that the motive is not used as a means for determining degree of guilt, but simply as a species of proof to increase that presumption of guilt which other circumstances have aroused. It is employed as a single link in a chain of circumstantial evidence.<sup>1</sup>

Another though less important fact than the one we have just been considering, is that in ethics if an evil act be attempted, but thwarted by some outside circumstance, the guilt in the individual is none the

<sup>1</sup> Holmes says: "In some cases, actual malice or intent, in the common meaning of those words, is an element in crime. But it will be found that, when it is so, it is because the act when done maliciously is followed by harm which would not have followed the act alone, or because the intent raises a strong presumption that an act, innocent in itself, will be followed by other acts or events in connection with which it will accomplish the result sought to be prevented by the law." *The Common Law*, p. 76.

less. In law, however, mere intent to commit, without an actual beginning of the act, is never punished. Thus, if a burglar go to rob a house, and be frightened off by a policeman, no legal offence has been committed; whereas in ethics, the sin is manifest. The crime of criminal conspiracy appears at first to be an exception to this principle, for here the parties conspiring either to reach a lawful end by unlawful means, or to attain an unlawful end by lawful means, are held criminally responsible, even though no overt act in pursuance of this purpose be committed. The mere fact that they have so conspired is held sufficient. In truth, however, this is no exception to the principle we have stated, for by its very definition, criminal conspiracy consists in the conspiring and not in any unlawful acts which may be the outcome of the conspiracy. And thus, when unlawful acts are committed by conspirators, such conspirators may be held criminally liable for two distinct crimes: the conspiracy, and the unlawful act or acts committed in pursuance thereof.

But while the law does not punish mere intent, it does punish attempt. Thus, where an overt act is committed which is plainly but preliminary to the commission of a crime, as, for instance, where a man strikes a match to fire a house but blows it out when he perceives himself detected, he is criminally liable.

Also, though the intent itself is not punished, it is yet taken into consideration in determining the criminal nature of an overt act. Thus a simple

assault to injure, an assault to kill, and an assault with intent to rape are different crimes and differently punished. Thus, also, an accidental homicide becomes murder when it results from an act otherwise illegal ; as, for instance, where a man is resisting an officer of the law, or is firing at a neighbor's fowls and accidentally kills an unseen man.

What most clearly appears to be contradictory to the position we have taken as to our relation between law and morality is the fact that mitigating or extenuating circumstances are often brought forward in criminal trials to secure a lessening of punishment in those cases where there is a discretion allowed by the law, either to the judge or to the jury, as to the severity of the penalty to be imposed. Here, at first thought, it does seem that the idea is present that the conditions that modify moral guilt should have an influence in determining the measure of punishment imposed. In a certain sense, this is true. At the same time we think when the matter is carefully examined it will be found that purely utilitarian considerations will be found sufficient to support this discretion in almost if not in every case in which it is allowed. Thus, for instance, it may be recognized that justice will be more reformative when tempered in certain cases by mercy, or that its educative influence upon the moral thought of the people will be greater when the courts of law are seen to give weight to those same considerations which enter into the estimation of moral desert. Therefore, in order to secure these beneficial results,

those who allow the discretion, and the judges who exercise it, may be willing to suffer what little the law may lose in its deterrent effect. That such utilitarian considerations are at the basis of that discretion given to judges and juries in fixing amounts of punishment, is made evident by the fact that where deterrence is especially needed, the law does not hesitate to disregard extenuating circumstances. Thus, under ordinary conditions a judge or jury is inclined to look leniently upon the man who, after vainly seeking work or alms, steals bread for his starving children; but let a famine arise, so that there are thousands in want, and the law will quickly recognize the need for severity and, so far from admitting absolute want, however undeserved, as an excuse for theft, will even increase the penalties ordinarily inflicted.<sup>1</sup>

The most apparent exception to the doctrine that goodness of motive will not render innocent an otherwise criminal act, is the fact that homicide when committed in self-defence, or defence of the life of another, is justified by the law. When, however, this matter is closely examined, it is found that there are reasons other than those of moral responsibility which are fully adequate to explain the attitude of the State in this respect. In the first place, if we remember that the chief purpose of the criminal law is to deter from crime, it will be seen at once that if it is known that the law permits self-defence, even to the point

<sup>1</sup> Cf. Green, *Political Obligation*, §§ 194, 5, 6, and Bosanquet, *Philosophical Theory of the State*, p. 231.

of killing, this of itself furnishes in many cases an efficient deterrence. On the other hand, a threat of punishment can have no real deterrent effect upon an individual threatened with serious assault, for no future penalty can have at the time so great an influence as the danger which is immediately threatened. Furthermore, it is to be remembered, that he who is making the assault is himself attempting to commit a crime. Therefore, in exercising the right of self-defence, one is in reality endeavoring to prevent an illegal act. That this is the essential motive of the right is shown by the fact that resistance to an assault can never rightfully go beyond this. As Blackstone says, when speaking of self-defence: "It is held an excuse for breaches of the peace, nay even for homicide itself; but care must be taken that the resistance does not exceed the bounds of mere defence and protection; for then the defender would himself become an aggressor."<sup>1</sup> It thus appears that, after all, the right of self-defence against assault is no broader than the right of any bystander, though not himself threatened, to prevent with force, or even killing if necessary, the execution of a criminal act. In such cases the one attacked, or the bystander, is allowed himself to assume the office of a guardian of the peace, because only by so doing can effective restraint be applied.

Upon purely utilitarian grounds, therefore, the law is justified in excusing injuries done in legitimate self-defence.

<sup>1</sup> *Commentaries*, Book III, Chapter I.

Sufficient has been said to show that in the administration of criminal law the idea of crime is kept wholly distinct from that of sin; the idea of legal wrong-doing from that of wickedness. When, however, we turn from the administration of the law to its enactment, the conditions are changed. In determining what acts shall be declared *mala prohibita*, legislators are necessarily controlled, not only by considerations of social safety and expediency, but by motives of morality. That is to say, laws are enacted to prevent not simply such acts as are counter to public safety and material welfare, but such as are wicked when judged by the moral canons of the legislators. There are, to be sure, a school of thinkers who, accepting the doctrines put forward by J. S. Mill in his *Essay on Liberty*, maintain that the power of the State should never be extended so as to cover acts not matters of social expediency. The invalidity of the reasoning upon which such an absolute principle is founded we have, however, elsewhere shown.

This attempt on the part of the criminal code to advance morality by the punishments which it threatens is, however, by no means an acceptance of the idea that punishment should be inflicted in a retributive sense. Certain acts are prohibited solely because they are deemed wicked, or immoral, and punishment is inflicted upon those who disregard the prohibitions; but, and here is the point, such punishments are inflicted not simply because it is desired that the offenders shall suffer pain, but

in the hope, either that others will thereby be deterred from sinning, or that some reformatory or educational influence will be exercised by it.

It may thus be said in conclusion, that when we assert that law and morality occupy distinct fields, it is meant, not that the law never attempts to advance morality or to suppress vice, but that it never makes moral guilt a test for determining, or a standard for measuring, legal guilt; and, as a necessary consequence, that it never inflicts punishment except for the sake of some future good to be reached by it.

**Capital Punishment.** — There is one form of punishment which, while it does not logically call for the application of principles not already discussed, is yet of such a special character as to warrant a few words of special treatment. We refer to capital punishment.

Beccaria, as we have already mentioned, denied that there could be a possible justification for the infliction of the death penalty on the ground of its incompatibility with the original compact, which, as he conceived, furnished the ethical basis for all civil society. Kant's answer to this we have also considered. But the right to punish by death has been widely denied by many who place no faith in the social-compact theory. Those who advocate reformation as either the sole or chief aim of penal law necessarily oppose its infliction, for, as is obvious, no idea of a good to the victim himself can be considered a possible outcome from it. Others deny its expediency, and therefore its justice, aside from

its abandonment of the reformatory idea; alleging that, instead of being morally educative to the community at large, it is brutalizing, and that, as experience has demonstrated, it is not even deterrent to any considerable degree. This leaves only the preventive aim for it to realize; but for this it is said life imprisonment is fully adequate.

When the opposition to capital punishment is put upon grounds such as these, the question is reduced to one simply of fact, and can be argued upon that basis. And this, as we believe, is the only manner in which it should be argued. There are, however, a considerable number who base their denial to society of a right to inflict death upon the *a priori* ground that the right of the individual to his life is of such an absolute character that it may be violated under no conceivable circumstances.

Upon this point we take issue with them. As our whole argument thus far has shown, there are, and can be, no absolute rights. It is true that, inasmuch as the possession of life is to the individual *a conditio sine qua non* for the enjoyment of any other right, his taking off can scarcely be justified so long as we look simply to his particular good. When, however, we view him as a *socius*, and consider his rights from the social standpoint, this is no longer so. When so considered it is easy to conceive conditions under which the sacrifice of individual life is the lesser of two evils. This becomes conspicuous when a homicide is demanded in self-defence either of an individual or a nation.

Still, it is not to be understood that, even as between the life of a nation and that of one or a few of its citizens, the former should always prevail. Whether it should or not is dependent upon the service rendered to humanity by the national unit in question.

Thus also as between nations, there is no absolute right inhering in any of them to a continued independent existence. As Ritchie says: "The existence of any particular organism (either a political society or any other) not being of an absolute value, but simply as a means towards the well-being of individuals, there can be no absolute moral right to self-preservation in a society against some higher or better type of society in which these individuals may be absorbed or against the formation of more closely coherent and better societies out of an ill-compacted unity. . . . The right of self-preservation in a society is only valid against individuals who would break it up into mere chaos, not against any better form of society which may take its place" <sup>1</sup>

**Conclusion.** — In the face of an increasing material prosperity, a rising standard of comfort for the working classes, a widening diffusion of knowledge, and a general elevation of moral standards, not to speak of the strenuous and expensive efforts made by civilized States to prevent crime, a rapid decrease in criminality would naturally be expected, while an actual increase would seem impossible. Nevertheless, opinion seems to be divided as to whether or

<sup>1</sup> *Natural Rights*, Chapter VI.

not there can, in fact, be traced during recent years a relative decrease in crime as compared with the increase of population. Superintendent Brockway of the Elmira Reformatory a few years ago declared that "every nation provided with the means of computing such evidence, reports a steady growth of the evil far greater than the corresponding increase in population. The proportionate difference is especially manifest of late years. It is conceded that within the past two decades, crime has more than doubled." And the eminent penologist, M. Georges Vidal, in the introduction to his *Principes fondamentaux de la pénalité*, speaks of "*la marche toujours croissante de la criminalité de 1826 à 1880*"; and after quoting figures declares that "*ce mal social et ce danger toujours croissants ne sont du reste pas spéciaux à la France: ils sont généraux à tous les pays civilisés.*"

Other writers, however, either deny the accuracy of the figures upon which the above conclusions are founded, or contest the validity of the reasoning by which the conclusions are reached. Thus Hon. Carroll D. Wright in a work just published declares:<sup>1</sup> "The question whether crime in this country is increasing or decreasing has not been definitely settled:" for "although the statistics of the whole number of criminals or sentences for crimes committed for any locality usually show increase, and sometimes alarming increase, they bring out only the superficial view of the case.

<sup>1</sup> *Practical Sociology*, 1899.

There are so many complications involved in every effort to ascertain the relative proportions of crime in different countries, or communities of the same country, or at different periods of time, that it is next to impossible even for the expert to arrive at a positive conclusion on the subject.”<sup>1</sup> Turning, however, from the United States to other countries, Commissioner Wright is more confident. He says: “In countries where we have statistics which avoid these anomalies and misleading comparisons [which exist in the United States] the status of crime is distinctly encouraging.” After giving figures to show a decrease in Great Britain, he declares that “continental countries show similar decrease; where the execution of law has been uniform the decrease is apparent.”

Without attempting to harmonize or to decide between these views, we may draw one conclusion as common to both. This is that, however looked at, the strenuous efforts which societies have made to check crime have at the most done little more than prevent its increase. This means, then, that little success has been reached either in the reformatory, educative, or deterrent directions. As a matter of fact, so far as regards the reformatory idea, there would probably be a consensus of opinion that, upon the whole, criminal law, as it has actually been administered in the past, has been far more corrupting than elevating to the individuals punished. And for the future the most sanguine are not inclined to

<sup>1</sup> *Op. cit.*, Part VII, Chapter XXI.

believe that it will be possible, even with the most approved methods, to make the reformation obtained more than balance the inevitable corruption that punishment brings by the evil associations it necessitates, and the blow to pride and self-respect it gives. As for the educative value of punishment, this is in the highest degree problematical, and many there are who would reduce its possible influence to a very small maximum. How far penal laws have been deterrent it is impossible to say; but at the most, as we have seen, they have been efficient only to the extent of preventing an increase of crime. As regards, finally, the preventive idea, except where the punishment of death or imprisonment for life is imposed, little is accomplished.

The one lesson, then, which all these facts teach us is that, for a solution of the problem of crime, the real effort must be to abolish the causes of crime, in so far as they are dependent upon conditions within our control. This means, in truth, entire social regeneration; for wherever there is injustice, there will be crime. Not all crime, it is true, may be ascribed to social causes. Some of it is undoubtedly due to the deliberate choice of evil minds or to the promptings of the passions. But with social justice everywhere realized, with economic and social relations properly regulated, and with true education, mental and moral, technical and academic, adequately applied, a long step will have been taken towards the solution of the grave evil we have been discussing. Though possibly exaggerated, there is yet substan-

tial truth in the declaration of Ferri that "the least measure of progress with reforms which prevent crime, is a hundred times more useful and profitable than the publication of an entire penal code."<sup>1</sup>

A deterrent penalty only becomes operative in those cases where it has failed of effect. A reformatory discipline is only applicable where the subject of it has already been corrupted. An educative law presupposes an ignorant or biased mind. In very large measure the necessity for the enforcement of penal laws is a demonstration that proper preventive measures have not been taken. Fundamentally, then, any penal system is unjust in so far as the necessity for it might have been avoided by proper social conduct. Thus, as Green has said, "The justice of the punishment depends on the justice of the general system of rights; not merely on the propriety with reference to social well-being of maintaining this or that particular right which the crime punished violates, but on the question whether the social organism in which a criminal has lived and acted is one that has given him a fair chance of not being a criminal."<sup>2</sup>

<sup>1</sup> *Criminal Sociology*, p. 135.

<sup>2</sup> *Principles of Political Obligation*, § 189.

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